2011

A Right is Born: Celebrity, Property, and Postmodern Lawmaking

Mark Bartholomew

CONNECTICUT
LAW REVIEW

VOLUME 44 DECEMBER 2011 NUMBER 2

Article

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This Article challenges the standard account of the creation of the right of publicity. In legal literature, the prevailing narrative is of the right of publicity being intimately linked to the commodification of celebrity. Ultimately, however, there may be more to the story of the right of publicity than the decision to protect something of economic value. It took decades after it had become clear that celebrities could be valuable commercial spokespersons for lawmakers to agree to make the right inheritable, separate from the dignitary right of privacy, and potentially applicable to any economic, secondary use that invoked the celebrity plaintiff. It was only in the later part of the twentieth century, when American understandings of celebrity became rationalized and democratized, that the right of publicity was reconceptualized as a much more vigorous and far-reaching economic entitlement. By examining the discourse and political environment surrounding the emergence of this new right, this Article offers a new narrative for the right of publicity's creation, suggests some broader insights into the social forces that shape property rights, and enriches a growing body of legal theory examining the public's role in producing legal change.

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A Right Is Born: Celebrity, Property, and Postmodern Lawmaking

MARK BARTHOLOMEW*

I. INTRODUCTION

The right of publicity is defined as "an individual's right to the exclusive commercial use of his or her name and likeness."[1] Legal scholars offer different criticisms of this right,[2] but they generally agree on

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* Associate Professor of Law, State University of New York at Buffalo. For comments on the Article and helpful discussions of the ideas involved, I thank Horace Anderson, Jr., Rochelle Dreyfuss, Jeanne Fromer, Angela Harris, Ken Joyce, Sonia Katyal, Greg Lastowka, Amy Maggs, Greg Mandel, Isabel Marcus, Jason Mazzone, Jack Schlegel, Rob Steinfeld, Eva Subotnik, Mateo Taussig-Rubbo, John Tehranian, Diane Zimmerman and participants at workshops at Albany Law School, Fordham Law School, and the University at Buffalo Law School. Thanks to Randy Clower, Nicole Haimson, and Lee Sobieski for research assistance.

[1] Toffoloni v. LFP Publ'g Grp., LLC, 572 F.3d 1201, 1205 (11th Cir. 2009).

[2] It would be hard to find a property right more vilified in the legal academy than the right of publicity. Some describe the right as illogical. *See, e.g.*, Lee Goldman, *Elvis Is Alive, But He Shouldn't Be: The Right of Publicity Revisited*, 1992 BYU L. REV. 597, 613 (describing the right as lacking a "compelling rationale"); Marshall Leaffler, *The Right of Publicity: A Comparative Perspective*, 70 ALB. L. REV. 1357, 1359 (2007) (describing the right as being based on "on dubious and incoherent principles"); Diane Leenheer Zimmerman, *Money as a Thumb on the Constitutional Scale: Weighing Speech Against Publicity Rights*, 50 B.C. L. REV. 1503, 1524 (2009) (concluding that a property right in a public persona is "entirely wrong-headed"); *see also* Michael J. Albano, Note, *Nothing to Cheer About: A Call for Reform of the Right of Publicity in Audiovisual Characters*, 90 GEO. L.J. 253, 253 (2001) (contending that by conferring on actors a right of publicity in the fictional characters through which they became famous, the courts are "overstep[ping] the bounds of logic"); Drake Bennett, *Star Power: Celebrities Have a Legal Right to Prevent the Commercial Use of Their Images Without Permission*, BOS. GLOBE, June 4, 2006, at E1 (labeling the right of publicity "far-fetched"). Others complain that the right is out of step with international trends. *See, e.g.*, Ellen S. Bass, *A Right in Search of a Coherent Rationale—Conceptualizing Persona in a Comparative Context: The United States Right of Publicity and German Personality Rights*, 42 U.S.F. L. REV. 799, 804 (2008) (explaining how "German personality rights [are] conceptually fundamentally different from publicity rights in the United States"); Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161, 1184 (2006) ("A broad right of publicity runs counter to historical assumptions and social norms in the United States and around the world."). Others complain about the right's potential to chill free expression. *See, e.g.*, Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Law and Democratic Dialogue*, 69 TEX. L. REV. 1853, 1865–67 (1991) (arguing that the increase in enforcement of intellectual property rights, including the right of publicity, could potentially inhibit cultural dialogue); Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 125, 134 (1993) (putting forth the theory that publicity rights limit "free expression and cultural pluralism"); Eugene Volokh, *Freedom of Speech and the Right of Publicity*, 40 HOUS. L. REV. 903, 925 (2003) (noting that in its largest sense, using a celebrity's image or likeness in advertising should be protected under the First Amendment); David S. Welkowitz & Tyler T. Ochoa, *The Terminator as Eraser: How Arnold*

when and why courts and legislatures decided to recognize it. The standard account of the right's creation goes like this: The right came into being in the 1950s once the practice of advertising using celebrities had grown to such an extent that the commercial value of celebrity became apparent.[3] Increased access to media and a weakening of familial ties in the early 1900s paved the way for rapid growth in the popularity of entertainment and sports figures, with a concomitant premium placed on their use in advertising.[4] Celebrities now had new economic value; hence, they needed new legal privileges to protect that value. The prevailing narrative, therefore, intimately links the right of publicity with the commodification of celebrity. Once something is viewed as having market value, the legal system invariably steps in to protect that value.[5]

Ultimately, however, there is more to the story of the right of publicity than the decision to protect something of economic value. This Article offers a different account of how the famous earned protections from lawmakers. Even after the right of publicity was first articulated in the 1950s, something held lawmakers back. Rather than championing full property rights in celebrity personas, courts and legislatures made sure that the right was not descendible and that the aspects of a persona that were

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Schwarzenegger Used the Right of Publicity to Terminate Non-Defamatory Political Speech, 45 SANTA CLARA L. REV. 651, 671 (2005) (explaining how a celebrity's right to privacy can have a "stultifying effect on freedom of expression").

[3] *See* George M. Armstrong, Jr., *The Reification of Celebrity: Persona as Property*, 51 LA. L. REV. 443, 455 (1991) (discussing how opportunities to market personas were practically nonexistent in the nineteenth century); Madow, *supra* note 2, at 148 (stating that the "standard answer" for why the right was not recognized until relatively recently is that "nothing in our experience before the early 1900's . . . made such a right necessary"); Steven Semeraro, *Property's End: Why Competition Policy Should Limit the Right of Publicity*, 43 CONN. L. REV. 753, 784 (2011) ("[W]hen the right of publicity arose in the 1950s, 'the needs of Broadway and Hollywood' were far different from the use of celebrity in popular culture in earlier times.").

[4] *See* ELLIS CASHMORE, CELEBRITY/CULTURE 87–88 (2006) (discussing how societal changes made way for a "universal culture currency" and "celebrity worship"); Kirsten Rabe Smolensky, *Rights of the Dead*, 37 HOFSTRA L. REV. 763, 789 (2009) ("The inventions of radio and television gave birth to the right of publicity in 1953 or 1954 and eventually led to the creation of a posthumous right of publicity as early as the mid-1970s.").

[5] *See, e.g.*, Armstrong, *supra* note 3, at 463–64 (arguing that "the market also modifies our concept[s] of [value and] morality" and influences the molding of legal ideas); Rosemary J. Coombe, *Author/izing the Celebrity: Publicity Rights, Postmodern Politics, and Unauthorized Genders*, 10 CARDOZO ARTS & ENT. L.J. 365, 368–69 (1992) (discussing the commercial value of celebrity, as well as the potential legal justifications and ramifications of granting a property right in a celebrity's persona); Dogan & Lemley, *supra* note 2, at 1172–74 (stating that the courts, in evaluating publicity claims, increasingly "adopted an attitude of 'if value, then right'"); Diane Leenheer Zimmerman, *Who Put the Right in the Right of Publicity?*, 9 DEPAUL-LCA J. ART & ENT. L. & POL'Y 35, 51 (1998) ("Lawmakers and creative individuals alike increasingly treat as received truth the contestable intuition that producers of intellectual . . . products should have a 'right' to any income stream their labor can generate. . . . This pro-property mind-set has been further encouraged by the gradual recognition that income from intellectual property makes up a very significant part of the United States' balance of payments in the international trade arena.").

protected remained limited. It took decades after it had become clear that celebrities could be effective commercial spokespersons for the right of publicity to change in significant ways, ultimately strengthening the power of celebrity and creating a powerful economic entitlement.

The right's history shows that not every story of commodification results in immediate recognition by the legal system. In many situations, despite the existence of obvious exchange value in a particular item, legal recognition of that value is withdrawn or is never recognized in the first place. Where once there was an understood market for appointments to political offices, such practices are no longer legal.[6] Although it is possible to envision a thriving market for the supply of infants to would-be parents, attempts to commodify adoption and surrogacy remain highly contested.[7] The facts making up information rich databases enjoy virtually no intellectual property protection in the United States despite their tremendous commercial value.[8] Perhaps even more analogous to rights in celebrity personas are the recent presentations by various intellectual property scholars on examples of intangible assets that have definite value to a particular community yet rely on social norms for their safeguarding rather than any official legal protection. Fashion designers, chefs, and magicians all construct intangible assets desired by others, yet these creators lack the intellectual property protections of other artists and inventors.[9] Hence, mere exchange value, in itself, is not necessarily a

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[6] *See, e.g.*, Susan Saulny & Malcolm Gay, *Illinois House Panel Unanimously Recommends Impeaching Governor*, N.Y. TIMES, Jan. 9, 2009, at A19 (discussing the recommended impeachment of Governor Blagojevich due to the questionable legality of the governor's appointment of Roland W. Burris to the Senate).

[7] *See* Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1850, 1925–34 (1987) (discussing the advantages and dangers of commodification of babies and surrogacy); *see also* Julia D. Mahoney, *Altruism, Markets, and Organ Procurement*, 72 LAW & CONTEMP. PROBS. 17, 20 (2009) (discussing widespread opposition to recognition of body parts as property that can be traded on the market and the creation of the National Organ Transplant Act (NOTA) in response to "fears that the demand for transplantable organs could lead to the commodification of the human body").

[8] *See* Jonathan M. Barnett, *Is Intellectual Property Trivial?*, 157 U. PA. L. REV. 1691, 1702 n.14 (2009) ("To be precise, U.S. law provides virtually no protection for the factual content of database products . . . ."); Kembrew McLeod, *The Private Ownership of People*, *in* THE CELEBRITY CULTURE READER 649, 660 (P. David Marshall ed., 2006) (indicating that large corporations have yet to secure intellectual property protection over large databases of consumer information).

[9] *See* Jacob Loshin, *Secrets Revealed: Protecting Magicians' Intellectual Property Without Law*, *in* LAW AND MAGIC: A COLLECTION OF ESSAYS 123, 135–37 (Christine A. Corcos ed., 2010) (discussing norms and methods within the magic community to protect secrets, techniques, and presentations); Emmanuelle Fauchart & Eric von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs*, 19 ORG. SCI. 187, 187–88 (2008) (comparing the attributes of norms-based and law-based intellectual property systems and relating it to the culinary industry); Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1689–91 (2006) (discussing the lack of intellectual property protection in the fashion industry); *see also* David Fagundes, *Talk Derby to Me: Emergent Property Norms in*

recipe for property rights.[10]

Instead, other social and political changes must occur before the legal system will create a new property right. In addition to facilitating market exchange, property laws also structure the social order.[11] Property rights set boundaries in the ways members of society interact, in effect serving as a blueprint for social relations.[12] As a result, judges and lawmakers must be made comfortable with the social implications of a legal right in something before property rights can accrete. Merely recognizing that something is valuable is not enough. Rather, other social forces—technological, cultural, and political—disrupt settled expectations and produce legal change. Part of the goal of this Article is to figure out what those social forces are by examining the context in which publicity rights grew at the end of the twentieth century. The approach in this Article complements a growing body of legal theory that examines the role of the broader public in producing legal change.[13] What it adds, in addition to

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Pseudonymous Performance Subcultures, 90 TEX. L. REV. (forthcoming 2011) (manuscript at 6) (discussing norm among roller derby players of not appropriating other players' nicknames).

[10] *See* Miller v. Comm'r of Internal Revenue, 299 F.2d 706, 709–10 (2d Cir. 1962) (noting that while one's time and experience can be sold, they are still not considered legal property); *see also* David Westfall & David Landau, *Publicity Rights as Property Rights*, 23 CARDOZO ARTS & ENT. L.J. 71, 72 (2005) (observing that "[p]ublicity rights initially emerged in response to functionalist considerations" as "transferable rights were needed to keep pace with commercial custom").

[11] *See* GREGORY S. ALEXANDER, COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776–1970 1–2 (1997) (arguing that viewing property as a market commodity is only half right and that "property is the material foundation for creating and maintaining the proper social order, the private basis for the public good"); JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 61 (2000) (explaining the regulatory functions and powers of property law to "enact[] a form of social life"); *see also* Eric T. Freyfogle, *Property and Liberty*, 34 HARV. ENVTL. L. REV. 75, 79 (2010) ("Private property is a social creation, arising out of law, and is inevitably justified (given its interferences with liberty) only to the extent that it benefits people collectively, non-owners as well as owners.").

[12] Joseph William Singer, *Democratic Estates: Property Law in a Free and Democratic Society*, 94 CORNELL L. REV. 1009, 1054 (2009).

[13] In constitutional law, this approach is typically referred to as "popular constitutionalism." *See* Doni Gewirtzman, *Glory Days: Popular Constitutionalism, Nostalgia, and the True Nature of Constitutional Culture*, 93 GEO. L.J. 897, 898–99 (2005) (summarizing the major popular constitutionalist literature). Its proponents explain that social movements play a key role in disrupting public understandings in a way that allows the public to engage legal institutions and eventually bring about reformulations of legal principles. *See* Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927, 946–50 (2006) (discussing the role of social movements in unsettling norms and legal ordering); Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1488–90 (2006) (arguing that "law's capacity to trigger social movement" has been overstated and that "nonlegal, noninstitutional forms of political activism" have been undervalued in the legal literature). There has been less exploration of the influence of such movements on property law, although some scholars have begun to articulate their own view of the relationship between property law and social change. *See, e.g.*, Nestor M. Davidson & Rashmi Dyal-Chand, *Property in Crisis*, 78 FORDHAM L. REV. 1607 (2010); Katherine V.W. Stone, *Knowledge at Work: Disputes Over the Ownership of Human Capital in the Changing*

refuting the conventional wisdom surrounding the birth of an important legal right, is the use of social history as a counterweight to the law and economics analysis that characterizes much of intellectual property scholarship.[14]

That history shows that in the later part of the twentieth century, American understandings of celebrity became democratized and rationalized, paving the way for increasing legal protections against secondary use of well-known personas. Once viewed with apprehension as a destabilizing, emotional phenomenon, celebrity came to be perceived as a valuable capitalist tool. At the same time, the definition of celebrity switched from a focus on historic accomplishments and inner talents to an emphasis on the potential ability of anyone to grab the media spotlight. It was only after these intellectual trends took hold that lawmakers became willing to increase the scope of celebrity rights.[15]

By examining the discourse and political environment surrounding the emergence of a new right, this Article hopes to offer a new narrative for the right of publicity's creation as well as broader insights into the social

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Workplace, 34 CONN. L. REV. 721, 721–25 (2002); Steven Wilf, *The Making of the Post-War Paradigm in American Intellectual Property Law*, 31 COLUM. J.L. & ARTS 139, 140–49 (2008).

[14] *See* Shyamkrishna Balganesh, *Debunking Blackstonian Copyright*, 118 YALE L.J. 1126, 1129 (2009) ("For the last several decades . . . the analysis of copyright law has come to be dominated by the traditional law and economics account of the institution."); *see also* Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 750 (2009) (describing law and economics analysis as dominating property scholarship in recent years); Jedediah Purdy, *People as Resources: Recruitment and Reciprocity in the Freedom-Promoting Approach to Property*, 56 DUKE L.J. 1047, 1052 (2007) (noting that much of the current commentary on property regimes has taken a "normative commitment to wealth-maximization").

[15] Admittedly, one must be careful before suggesting that a causal relationship exists between certain intellectual movements and the law. Academic discussions do not always translate into legal innovation. *See* Adam Liptak, *When Rendering Decisions, Judges Are Finding Law Reviews Irrelevant*, N.Y. TIMES, Mar. 19, 2007, at A8 (discussing the argument that law reviews "no longer [have] any impact on the courts"). Judges and legislative bodies make law for a host of reasons that may have less to do with theoretical coherence than respect for precedent, political expediency, and the strategic actions of litigants. *See, e.g.*, Gary T. Schwartz, *Considering the Proper Federal Role in American Tort Law*, 38 ARIZ. L. REV. 917, 936–37 (1996) (noting how manufacturers are often better able to influence the legislative process than consumers); Alexander Tabarrok & Eric Helland, *Court Politics: The Political Economy of Tort Awards*, 42 J.L. & ECON. 157, 186–87 (1999) (finding that elected judges permit higher damages awards, particularly against out-of-state businesses, than appointed judges). Yet failure to study the pronouncements of courts and legislatures for evidence of cultural influence results in an overly narrow construction of what we mean by "law." *See* P. John Kozyris, *Comparative Law for the Twenty-First Century: New Horizons and New Technologies*, 69 TUL. L. REV. 165, 168 (1994) ("Laws cannot be grasped in an idealized form outside the context of the society that created them."); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict, and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1325 & n.6 (2006) (articulating a general theory for how social movements influence legal understandings); *see also* Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515, 1516–17 (2010) (arguing that Supreme Court decisions are more influenced by political and academic elites than public opinion). The impetus for lawmaking comes from several sources, but intellectual trends are surely one of them.

forces that shape legal change. To that end, Part II describes how the right of publicity transformed from a non-descendible, narrow personal right in the 1950s to a descendible, broadly construed property right in the 1980s and 1990s. Although the right of publicity first appeared in the courts in 1953, it took decades for it to be augmented in a manner resembling other types of intellectual property. It was only during the last two decades of the century that this right became inheritable, separate from the dignitary right of privacy, and applicable to any secondary, economic use that invoked the celebrity plaintiff.

Parts III–V trace the evolution of celebrity over the second half of the twentieth century, offering evidence of intellectual and political change and suggesting how that change is mirrored in the decisions of courts and state legislatures. Part III reveals that the economic understanding of celebrity changed at the end of the twentieth century. Long after it was understood that celebrity had financial value, this understanding shifted to place a higher premium on that value and to attribute that value to a single individual. Rather than ratifying any item of value, the legal system took its time—only protecting celebrity personas after the economic potential of fame could be fully captured by the stars themselves and had eclipsed the financial rewards of achievement.

Part IV describes the rationalizing of celebrity. Intellectuals writing in the nineteenth and early twentieth centuries distrusted celebrity, perceiving the crowds that conferred celebrity status on select individuals as irrational and destructive. In time, however, efforts to quantify popularity convinced late twentieth century thinkers that fame could be harnessed in a way that was economically and socially productive. At the same time, new attention to the aesthetics of celebrity calmed fears over the psychologically destructive effects of fame. As celebrity was transformed into something predictable, legislators and judges abandoned their earlier hesitance to adopt legal rules that would encourage more and more citizens to seek fame.

Finally, Part V outlines the political economy of modern celebrity, describing celebrity's reconceptualization as a democratic force. The seminal changes to the right in the 1980s and 1990s—changes that greatly expanded the power of celebrities to halt outside uses of their personas—occurred in a particular political environment. A restrictive notion of fame was replaced with a different definition no longer linked to merit or inner greatness. Anyone, it was argued, had the potential to become famous. Meanwhile, the newfound economic power of celebrities translated into greater political power for them and their licensing agents. As a result, by the last part of the twentieth century, backers of the right of publicity could mobilize and successfully co-opt powerful interest groups that were once opposed to the right. Although cultural theorists of the time articulated new theories of the celebrity audience that stressed the importance of

individual reworking of celebrity texts, individual consumers lacked an effective voice in the legislative process and failed to halt the expansion of celebrity rights.

II. HISTORICAL EVOLUTION OF THE RIGHT OF PUBLICITY

The fledgling right of publicity underwent significant changes in the 1980s and 1990s. First, it became accepted doctrine in most jurisdictions that the right was descendible, ensuring centralized control of commercial use of celebrity personae decades after the celebrity died. Prior to the 1980s, most courts and legislatures did not provide for celebrity rights after death. Second, the right shifted away from its genesis in the right of privacy, becoming a separate legal tool aligned with economic power rather than dignitary interests. Third, the aspects of persona governed by the right expanded greatly, placing more power in the hands of celebrities and their assignees. The rest of this Part describes these changes in more detail. Parts III–V explain why these changes occurred when they did.

A. *The Right of Publicity Before the 1980s*

Most explanations of the right of publicity begin with a discussion of privacy rights.[16] Before 1953, celebrity litigants wishing to block unauthorized use of their name or likeness charged violations of the "right of privacy." Born from an 1890 law review article authored by Samuel Warren and Louis Brandeis, as originally articulated, the right of privacy protected citizens from the disclosure of embarrassing private facts.[17] The right of privacy, also expressed as the right of an individual "to be let alone," was viewed as a necessary counterweight to commercial and technological innovations that increasingly pried into one's private life.[18] Sometimes the right was used to stop commercial appropriations of one's persona. For example, in one early case, the Georgia Supreme Court used the Warren and Brandeis theory to block unauthorized use of a person's photograph in a newspaper advertisement for life insurance.[19] The court sympathized with the plaintiff, describing "the humiliation and mortification of having his picture displayed in places where he would

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[16] *See, e.g.*, Shyamkrishna Balganesh, *The Pragmatic Incrementalism of Common Law Intellectual Property*, 63 VAND. L. REV. 1543, 1557 (2010); Dogan & Lemley, *supra* note 2, at 1167–71; Roberta Rosenthal Kwall, *Is Independence Day Dawning for the Right of Publicity?*, 17 U.C. DAVIS L. REV. 191, 192–95 (1983); Gloria Franke, Note, *The Right of Publicity vs. the First Amendment: Will One Test Ever Capture the Starring Role?*, 79 S. CAL. L. REV. 945, 948–52 (2006).

[17] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 215–16 (1890) (explaining, in part, that "[t]he general object in view is to protect the privacy of private life").

[18] *Id.* at 205; *see also* Dogan & Lemley, *supra* note 2, at 1168 (stating that a privacy right "would redress the harms that private individuals suffered from invasions of their privacy").

[19] Pavesich v. New England Life Ins. Co., 50 S.E. 68, 74 (Ga. 1905).

never go to be gazed upon, at times when and under circumstances where if he were personally present the sensibilities of his nature would be severely shocked."[20]

For most celebrity plaintiffs, however, their efforts to halt commercial use of their name or likeness fit awkwardly into the standard account of the right of privacy. As articulated by Warren and Brandeis, the privacy right was designed to protect dignitary interests, not economic ones. As a result, remedies in privacy cases necessitated a showing of emotional distress.[21] But celebrities, rather than being emotionally harmed by having their image thrust before the public, actually labored for just that result, as evidenced by their public performances. Hence, courts in the first half of the twentieth century denied relief to celebrities suing for unauthorized use of their name or likeness because, it was reasoned, every celebrity needed and wanted the public to be aware of their persona.[22]

By most accounts, what is thought of today as the right of publicity came into being in 1953 in the case of *Haelan Laboratories v. Topps Chewing Gum*.[23] The parties in that matter both published baseball cards, but only the plaintiff had obtained exclusive contracts granting permission from the featured players to have their pictures on the cards.[24] As with other celebrity cases of the time, the right of privacy seemed mismatched to the plaintiff's claims. Because the baseball players had already sought the public eye and had already consented to having their pictures sold along with chewing gum (albeit not the defendants' chewing gum), it was hard to justify relief under a theory of dignitary harm.

Rather than trying to shoehorn the plaintiffs' claim into the right of privacy, the Second Circuit in *Haelan* called into being a new right. This new right, "the right to grant the exclusive privilege of publishing [one's] picture," was anchored in commercial possibility, not in the right to be let alone.[25] As the decision's author, Judge Jerome Frank, explained, "it is

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[20] *Id.* at 80.

[21] *See, e.g.*, Eick v. Perk Dog Food Co., 106 N.E.2d 742, 745 (Ill. App. Ct. 1952). In the *Pavesich* case, the court maintained that the newspaper advertisement at issue would make Pavesich "contemptible" among his friends once they found that he actually did not own that particular insurance policy. *Pavesich*, 50 S.E. at 81.

[22] *E.g.*, O'Brien v. Pabst Sales Co., 124 F.2d 167, 170 (5th Cir. 1941) (reasoning that for a professional football player whose photograph was used in a beer commercial without his permission, "the publicity he got was only that which he had been constantly seeking and receiving"); Pallas v. Crowley-Milner & Co., 54 N.W.2d 595, 597 (Mich. 1952) (holding that plaintiff had waived her privacy right against advertiser because she had become known as a performer and model); *see also* 1 J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 1:25 (2d ed. 2009) ("Locked into the rubric of a 'right to be let alone and private,' privacy law seemed unable to accommodate the claims of those whose identity was already public.").

[23] 202 F.2d 866 (2d Cir. 1953); *see also* 1 MCCARTHY, *supra* note 22, § 1:26 (noting *Haelan* as the first case to use the term "right of publicity").

[24] *Haelan*, 202 F.2d at 867.

[25] *Id.* at 868.

common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, buses, trains, and subways."[26] Although linked to the right of privacy (as articulated by Judge Frank), this new right was rooted, not in dignitary concerns, but rather in a belief that famous persons should control the economic rewards of their celebrity.[27]

Haelan represented a great expansion in the law. Now even those who sought the public eye instead of seclusion could use the courts to block unauthorized uses of their images. Yet this expansion was cabined in several ways. First, the early right of publicity died with the celebrity at issue.[28] The most influential jurisdiction for celebrity rights, California, concluded that the right was not descendible.[29] The second most influential jurisdiction, New York, concluded the same after some initial moves in the opposite direction.[30] In general, the California and New York decisions squared with the rest of the states.[31] In a 1980 decision, the Sixth

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[26] *Id.*

[27] *See* Harold R. Gordon, *Right of Property in Name, Likeness, Personality and History*, 55 NW. U. L. REV. 553, 555 (1961) (describing early publicity cases as involving "the *right to be free from commercial exploitation*, rather than the 'right to be let alone'"); Joseph R. Grodin, Note, *The Right of Publicity: A Doctrinal Innovation*, 62 YALE L.J. 1123, 1127 (1953) ("[T]he *Haelan* case gave protection to persons' commercial interest in their personality independent of their privacy interest.").

[28] David S. Wall, *Policing Elvis: Legal Action and the Shaping of Postmortem Celebrity Culture as Contested Space*, 2 ENT. L. 35, 58 (2003) (stating that before the early 1980s, "the consensus of opinion was that the rights to publicity could be exercised throughout the lifetime of the artist, but that they were not descendible upon death").

[29] Guglielmi v. Spelling-Goldberg Prods., 603 P.2d 454, 455 (Cal. 1979) (holding that "the right of publicity protects against the unauthorized use of one's name, likeness or personality, but that the right is not descendible and expires upon the death of the person so protected"); *see also* Groucho Marx Prods., Inc. v. Day & Night Co., 689 F.2d 317, 320 (2d Cir. 1982) (construing California law and concluding that under the law of the State, "an individual's right of publicity terminates at his death").

[30] Initially, federal courts asked to construe New York common law hypothesized that New York would recognize postmortem publicity rights. *See, e.g.*, Hicks v. Casablanca Records, 464 F. Supp. 426, 429 (S.D.N.Y. 1978) (stating that the court had found the right of publicity to be a "valid property right which is transferable and capable of surviving the death of the owner"); Price v. Hal Roach Studios, Inc., 400 F. Supp. 836, 844 (S.D.N.Y. 1975) ("There appears to be no logical reason to terminate [the right of publicity] upon death of the person protected."). The New York state courts rejected this approach, ruling that no right of publicity protection exists in New York outside of the state privacy statute and the statute does not provide for postmortem publicity rights. *See* Stephano v. News Grp. Pubs., Inc., 474 N.E.2d 580, 584 (N.Y. 1984) (holding there was no common law right of publicity); Smith v. Long Island Jewish Hillside Med. Ctr., 499 N.Y.S.2d 167, 168 (App. Div. 1986) (finding that the invasion of an infant's privacy "belonged to the infant alone and was extinguished upon the infant's death"); Antonetty v. Cuomo, 502 N.Y.S.2d 902, 906 (Sup. Ct. 1986) (refusing to recognize publicity and defamation claims for a deceased celebrity).

[31] *See* Armstrong, *supra* note 3, at 443 ("Until the 1970s any commercial value associated with celebrity was personal to the star and entered the public domain at death."); Smolensky, *supra* note 4, at 790 ("Like other privacy rights, the right of publicity traditionally died with the decedent, and estates

Circuit offered a particularly vigorous critique of a descendible publicity right.[32] The court articulated a variety of arguments against recognizing a posthumous right under Tennessee common law. It listed multiple prudential concerns over the length of such a right and its tax consequences and scoffed at the idea that rights after death would somehow incentivize creative endeavors.[33]

The prohibition on posthumous rights represented a significant check on the right of publicity. Strictly as a matter of timing, it meant that celebrity could only be monetized during a famous person's lifespan. The limited timeframe diminished celebrity's value. Publicity rights were worth less money, as merchandisers and licensees could never be sure when their exclusive rights would run out, i.e., when the celebrity at issue would die.[34]

In addition, the ban on postmortem publicity rights designated such rights as an inferior sort of property—if they were even considered property at all. "The right to control the disposition of property at death is often seen as essential to the very notion of private property."[35] The Supreme Court has called the right to bequeath one's property at death "one of the most essential sticks" in the bundle of property rights.[36] Yet, by separating the right of testamentary disposition from publicity rights, courts made sure that the publicity right had an inferior status.[37] If the celebrity did not have "absolute dominion" over her name and persona, then publicity rights represented only a quasi-property right that could be watered down when courts faced controversial questions.[38]

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were not allowed to bring suit to recover for the unauthorized use of the decedent's likeness."); Zimmerman, *supra* note 5, at 45 (contending that in the earliest publicity cases "courts were slow to allow the right to be exercised by anyone but the celebrity herself or to permit its survival at death").

[32] *See* Memphis Dev. Found. v. Factors Etc., Inc., 616 F.2d 956 (6th Cir. 1980) (refusing to protect Elvis Presley's right of publicity after his death).

[33] *Id.* at 959–60. Courts at the time also suggested that allowing publicity rights to be asserted on behalf of the dead presented particular First Amendment concerns. When asked to use the right of publicity to block Norman Mailer's biography of Marilyn Monroe, the Supreme Court, Appellate Division, of New York put it bluntly: "The protection of the right of free expression is so important that we should not extend any right of publicity, if such exists, to give rise to a cause of action against the publication of a literary work about a deceased person." Frosch v. Grosset & Dunlap, Inc., 427 N.Y.S.2d 828, 829 (App. Div. 1980).

[34] *See* Westfall & Landau, *supra* note 10, at 87–88; *see also* Lugosi v. Universal Pictures, 603 P.2d 425, 445–46 (Cal. 1979) (Bird, C.J., dissenting) ("[C]utting [the right of publicity] off at death would seriously impair its value during life and erode commercial certainty as licensees would be less willing to pay for a right that could be cut off suddenly at any time.").

[35] RAY D. MADOFF, IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD 57 (2010).

[36] Hodel v. Irving, 481 U.S. 704, 716 (1987).

[37] *See* Andrew B. Sims, *Right of Publicity: Survivability Reconsidered*, 49 FORDHAM L. REV. 453, 456 (1981) ("[M]ost property rights in our legal system are both assignable and survivable . . . .").

[38] *See* DUNCAN KENNEDY, THE RISE & FALL OF CLASSICAL LEGAL THOUGHT 6 (2006) (describing classical legal thought as guided by the conception of a system of individual legal property

Second, courts construing the early right of publicity often refused to completely disengage it from its right of privacy origins.[39] Some evidence of this can be seen in the decisions to limit the right of publicity to the lifetime of the personality at issue. Courts reasoned that if the publicity right stemmed from the right of privacy, and rights of privacy were personal rights that perished with the death of the individual whose privacy was threatened, then the publicity right should also cease upon death.[40]

Many judges approached the new right with extreme caution and refused to attach the label "property" to it. Hence, the Second Circuit, just a few years after deciding *Haelan*, determined that band-leader Glenn Miller's publicity rights, when sold by his widow to a movie studio, did not represent "property."[41] The Sixth Circuit concluded that the right of publicity, even though it had commercial value, resembled some species of property legally inferior to personal property, similar to "titles," "offices," "trust," and "friendship."[42] The court stated, "[f]ame falls in the same category as reputation; it is an attribute from which others may benefit but may not own."[43] Other courts raised the question of whether the right should be labeled a "tort right" or a "property right" only to refuse to decide the issue.[44] In other decisions, judges carefully referred to the right

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holders exercising an "absolute dominion over property"); Semeraro, *supra* note 3, at 818 ("True property rights empower their owners to prohibit speech that uses the owner's property. Free speech analysis thus begs the ultimate question as to whether the right of publicity is a valid property right. If not, speech interests trump the celebrity's interests.").

[39] *See, e.g.*, Hicks v. Casablanca Records, 464 F. Supp. 426, 430 (S.D.N.Y. 1978) ("[T]he rights of privacy and publicity are intertwined due to the similarity between the nature of the interests protected by each."); *Lugosi*, 603 P.2d at 429 (discussing the court's previous contention that the right of publicity is "essentially that of a claimed invasion of a right of privacy"); James v. Screen Gems, Inc., 344 P.2d 799, 800–01 (Cal. Ct. App. 1959) (denying the right of publicity claim of a celebrity's widow because the right of privacy cannot be asserted by a third person); *see also* Howard I. Berkman, *The Right of Publicity—Protection for Public Figures and Celebrities*, 42 BROOK. L. REV. 527, 540 (1976) ("Courts persist in confusing the right of publicity with the right of privacy and deny relief for invasion of the right of publicity in cases in which relief for invasion of the right of privacy is barred."). *But see* Price v. Hal Roach Studios, Inc., 400 F. Supp. 836, 843 (S.D.N.Y. 1975) ("While much confusion is generated by the notion that the right of publicity emanates from the classic right of privacy, the two rights are clearly separable.").

[40] *E.g.*, Reeves v. United Artists Corp., 765 F.2d 79, 80 (6th Cir. 1985) (holding that the widow of the professional boxer featured in the film *Raging Bull* had no right of publicity claim under Ohio law because the right of publicity is part of Ohio's law of invasion of privacy); *see also* Westfall & Landau, *supra* note 10, at 86 (describing courts who considered publicity rights to be personal rights and therefore not descendible).

[41] Miller v. Comm'r of Internal Revenue, 299 F.2d 706, 711 (2d Cir. 1962).

[42] Memphis Dev. Found. v. Factors Etc., Inc., 616 F.2d 956, 959 (6th Cir. 1980).

[43] *Id.*

[44] *See* Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868–69 (2d Cir. 1953) ("Whether [the right of publicity] be labeled a 'property' right is immaterial . . . ."); Guglielmi v. Spelling-Goldberg Prods., 140 Cal. Rptr. 775, 778 (Ct. App. 1977), *rev'd*, 603 P.2d 454 (Cal. 1979) ("It is unimportant whether the [right of publicity] is labeled as a tort right or property right."); *see also* William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 406 (1960) ("It seems quite pointless to dispute

as a "proprietary" right rather than a property right, attaching a label to the right of publicity commonly used to describe not real or personal property, but the lesser form of intellectual property.[45] Thus, despite the *Haelan* decision, courts in the 1960s and 1970s remained wary of the new right and refused to treat celebrity personas as full-fledged items of personal property.

Third, courts limited the early right of publicity by narrowly defining the personal features subject to legal protection. While using the name or photographic image of the celebrity fell within the scope of the new right, intentional imitations of a celebrity's voice did not.[46] Thus, when Nancy Sinatra sued Goodyear Tire for airing radio and television commercials featuring a singer hired to imitate her own singing style, the Ninth Circuit rejected her claim, suggesting that Sinatra's voice was not distinctive enough to deserve protection.[47] In a similar case involving actress Shirley Booth, the court expressed concern with recognizing publicity claims against mere imitators given the difficulty of enforcing and policing a ban on inexact copies of someone's persona.[48] Statutory rights of publicity of

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over whether such a right is to be classified as 'property.'") (quoted with approval in Lugosi v. Universal Pictures, 603 P.2d 425, 428 (Cal. 1979)).

[45] *See* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 573 (1977) ("[T]he State's interest in permitting a 'right of publicity' is in protecting the proprietary interest of the individual . . . ."); Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 825 (9th Cir. 1974) ("[W]e conclude that the California appellate courts would . . . afford legal protection to an individual's proprietary interest in his own identity."); Cher v. Forum Int'l, Ltd., 213 U.S.P.Q. 96, 101 (C.D. Cal. 1982), *aff'd in part, rev'd in part*, 692 F.2d 634 (9th Cir. 1982) ("The law affords protection to an individual's proprietary interest in his own identity."); Lombardo v. Doyle, Dane & Bernbach, Inc., 396 N.Y.S.2d 661, 664 (App. Div. 1977) ("There is no question but that a celebrity has a legitimate proprietary interest in his public personality."); *see also* Sonia K. Katyal, *Filtering, Piracy Surveillance, and Disobedience*, 32 COLUM. J.L. & ARTS 401, 412 (2009) (describing the "host of inherent limitations on both access and use" that are not found with real property that "often serve to complicate an intellectual property right").

[46] *See* Booth v. Colgate-Palmolive Co., 362 F. Supp. 343, 347 (S.D.N.Y. 1973) (holding that an imitation of a celebrity's voice did not constitute unfair competition under New York law); Sinatra v. Goodyear Tire & Rubber Co., 435 F.2d 711, 713, 718 (9th Cir. 1970) (affirming a ruling that imitation of a celebrity's voice did not rise to a cause of action); Davis v. Trans World Airlines, 297 F. Supp. 1145, 1147 (C.D. Cal. 1969) ("[I]mitation alone does not give rise to a cause of action.").

[47] *Sinatra*, 435 F.2d at 716. The court also expressed concern that a contrary ruling would violate federal copyright law. *See id.* at 717–18 (noting that a "clash with federal law seems inevitable" if the action were to be granted under state law).

[48] *Booth*, 362 F. Supp. at 347 (listing "persuasive reasons of public policy for refusing to recognize a performer's right of protection against imitators"). One option in this period for celebrity plaintiffs hindered by the narrow interpretation of the right of publicity was to turn to federal trademark law. Arguably, different aspects of a celebrity's persona can act as a trademark and therefore secondary uses of those aspects can be blocked under federal trademark law when there is a likelihood of consumer confusion. The Lanham Act prevents confusing uses of not just words but also "symbols," thereby potentially offering a mechanism for protecting aspects of celebrity identity. *See generally* Lanham Act, 15 U.S.C. §§ 1051–1141n (2006). Yet there were several limits on use of the Lanham Act to prevent secondary uses of celebrity. Longstanding doctrine held personal names as inherently non-distinctive and thus required proof of secondary meaning before a trademark

the time matched these courts' common law interpretations, typically limiting their reach to appropriations of a celebrity's name or likeness, and sometimes her actual voice.[49]

B. *The Right of Publicity in the 1980s and 1990s*

At the beginning of the 1980s, the right of publicity stood on uncertain ground. Although some courts and legislatures hinted towards recognizing posthumous publicity rights, the law did not appear to be moving in any clear direction.[50] As judges continued to discuss publicity rights and privacy rights in the same breath,[51] courts remained reluctant to recognize violations of the right that did not expressly involve use of the celebrity's name or likeness. In a relatively short period of time, this all changed. In the 1980s and 1990s, most state legislatures that addressed the issue found the right to be descendible. At the same time, judges finally broke the right away from its privacy law moorings. Doctrinal innovations showed less solicitude for the early restrictions on the right's scope and more concern with ensuring full capture of the economic benefits of celebrity by a single rights holder.

In 1980, legal opinion was split on whether the right of publicity should be descendible. Many courts and commentators argued that the right should die with the celebrity.[52] The Sixth Circuit contended that a postmortem publicity right was "contrary to our legal tradition and . . . to the moral presuppositions of our culture."[53] Nevertheless, in the next few

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infringement action could be recognized. *See* 2 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 13.2 (4th ed. 1996) ("[Surnames] acquire legally protectable status only after they have had such an impact upon a substantial part of the buying public as to have acquired 'secondary meaning.'"); *see also, e.g.*, L.E. Waterman Co. v. Modern Pen Co., 235 U.S. 88, 94 (1914) (stating that the law will protect against competitors intentionally attempting to cash in on an "established and well known" name). Moreover, for any aspect of a person's identity to acquire trademark rights, that aspect had to be used as mark. A celebrity who has never commercially exploited the symbols of her identity would therefore not be eligible for trademark protection. *See* 5 J. THOMAS MCCARTHY, *supra*, § 28:11. Hence, trademark protection at this stage only protected extremely well-known public figures that had already acted to commercially exploit their fame.

[49] *See, e.g.*, KY. REV. STAT. ANN. § 391.170(1) (West 2006) (limiting right to protection of "name and likeness"); TEX. PROP. CODE ANN. § 26.002 (West 2000) (limiting right to "the use of the individual's name, voice, signature, photograph, or likeness" after individual's death); UTAH CODE ANN. § 45-3-2(6) (LexisNexis 2010) (defining protectable "personal identity" as "an individual's name, title, picture, or portrait"); *see also* Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988) (interpreting California's right of publicity statute to apply only to use of the plaintiff's actual voice).

[50] *See* Kwall, *supra* note 16, at 207 (noting that there was "[c]onsiderable disagreement" among the courts over the descendibility issue during the early 1980s).

[51] *See* Berkman, *supra* note 39, at 527, 531.

[52] *See* Kwall, *supra* note 16, at 207–08 (stating that some courts refused to grant recovery for a decedent's relatives, even when the defendants appropriated the deceased's name and likeness for commercial purposes).

[53] Memphis Dev. Found. v. Factors Etc., 616 F.2d 956, 959 (6th Cir. 1980).

years, several state legislatures and courts adopted postmortem rights. In 1984, Kentucky enacted a law recognizing the right of publicity for fifty years after death.[54] In 1985, the California legislature passed a law explicitly designed to create a postmortem right of publicity, effectively overruling at least one state supreme court decision denying the right.[55] Oklahoma enacted a law in 1986 creating a postmortem publicity right with a one-hundred-year duration.[56] In 1987, the Texas legislature passed a bill to create a postmortem right that remains in effect for fifty years after the individual's death.[57] The Texas and Oklahoma statutes went so far as to extend their protections to celebrities who had died before the law was passed.[58]

Meanwhile, courts began to decide these matters differently than before. In *State v. Crowell*,[59] the Tennessee Court of Appeals issued what might have been the most full-throated judicial defense of the right in the decade, particularly given the Sixth Circuit's contrary interpretation of Tennessee common law just a few years earlier.[60] The court firmly established a common law postmortem right in Tennessee, noting that allowing use of a celebrity's image after death would result in "unjust enrichment" for advertisers and that, despite the lack of a national legal consensus on the issue, celebrities and businesses already had settled expectations that famous personae were valuable capital assets that lasted after death.[61] The court of appeals may have been somewhat emboldened by the Tennessee legislature's decision to create a statutory right of publicity in 1984. Not only did the home state of Elvis Presley create a postmortem right, but it allowed the statutory right to descend in perpetuity so long as the celebrity persona continued to be used commercially.[62]

In the 1990s, the postmortem march continued as more states passed laws granting posthumous publicity rights. Legislatures in Illinois,

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[54] 1 MCCARTHY, *supra* note 22, § 6:61.

[55] *Id.* § 6:24.

[56] OKLA. STAT. tit. 12, §§ 1448–1449 (2010).

[57] TEX. PROP. CODE ANN. § 26.012(d) (West 2000) ("A person may use a deceased individual's name, voice, signature, photograph, or likeness in any manner after the 50th anniversary of the date of the individual's death.").

[58] *See* OKLA. STAT. tit. 12, § 1448 (stating that a "deceased personality" shall include any person who died within fifty years prior to the statute's effective date); 1 MCCARTHY, *supra* note 22, § 6:120 (stating that the Texas publicity statute applies to any person who died within fifty years prior to the effective date of the statute).

[59] 733 S.W.2d 89 (Tenn. Ct. App. 1987)

[60] *See* Memphis Dev. Found. v. Factors, Etc., 616 F.2d 956, 959 (6th Cir. 1980) (stating that descendibility is "contrary to our legal tradition and somehow seems contrary to the moral presuppositions of our culture").

[61] *Crowell*, 733 S.W.2d at 98.

[62] TENN. CODE ANN. § 47-25-1105(a) (West 2010).

Indiana, Ohio, and Washington passed laws extending postmortem rights.[63] In Washington, for a person whose identity has commercial value at the time of his or her death, the right of publicity lasts an additional seventy-five years.[64] Indiana's statutory scheme is perhaps the most celebrity-friendly of any jurisdiction.[65] Enacted in 1994, the Indiana right of publicity statute grants a one-hundred-year postmortem duration that covers those who died as far back as 1894.[66]

Meanwhile, courts continued to conclude that state common law should provide postmortem rights. Even though Utah already had a statutory system of publicity rights that was limited to living persons, in 1990 a federal court decided that the state should also have a separate common law postmortem right of publicity.[67] Another federal court birthed a postmortem right of publicity in Connecticut.[68] Even the Sixth Circuit eventually had to admit defeat. Although the Michigan courts and legislature had never spoken on the issue, the Sixth Circuit concluded that "the weight of authority" mandated that a descendible right be recognized.[69] Today, most courts and commentators agree that the law has shifted and that publicity rights are descendible.[70]

The right also came to be conceptualized in a different way than it had been in the past. Courts switched to describing the right of publicity as a robust property right. Rejecting the Sixth Circuit's decision finding no descendible right of publicity under Tennessee common law, the *Crowell* court explained that the right had to be construed as an individual property

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[63] 765 ILL. COMP. STAT. 1075/30(b) (2009) (stating that a person may not use an individual's identity for commercial purposes for fifty years after the date of his or her death); OHIO REV. CODE ANN. § 2741.02(A) (LexisNexis 2008) (stating the general rule that a person shall not use any aspect of an individual's persona for a commercial purpose for a period of sixty years after his or her death); WASH. REV. CODE § 63.60.010 (2005) ("The property right does not expire upon the death of the individual or personality . . . ."); 1 MCCARTHY, *supra* note 22, § 6:59 (describing Indiana's right of publicity statute, which became effective in 1994 and protected the identity of both living and deceased persons).

[64] WASH. REV. CODE § 63.60.040(2).

[65] *See* 1 MCCARTHY, *supra* note 22, § 6:59 (describing Indiana's postmortem duration statute as "one of the most sweeping right of publicity statutes in the nation").

[66] IND. CODE § 32-36-1-8 (2002).

[67] Nature's Way Prods., Inc. v. Nature-Pharma, Inc., 736 F. Supp. 245, 252–53 (D. Utah 1990) (holding that the plaintiffs' complaint states a cause of action for which relief may be granted under the common law right of publicity, which "survives the death of the subject person in cases where he or she transferred or otherwise exploited such rights while alive").

[68] Jim Henson Prods., Inc. v. John T. Brady & Assocs., Inc., 867 F. Supp. 175, 190 (S.D.N.Y. 1994) (denying a summary judgment motion on the grounds that there is a descendible right of publicity under Connecticut law).

[69] Herman Miller, Inc. v. Palazzetti Imps. & Exps., Inc., 270 F.3d 298, 326 (6th Cir. 2000).

[70] *See, e.g.*, DAVID A. ELDER, PRIVACY TORTS § 6:7 (2006); Melissa B. Jacoby & Diane Leenheer Zimmerman, *Foreclosing on Fame: Exploring the Uncharted Boundaries of the Right of Publicity*, 77 N.Y.U. L. REV. 1322, 1324 (2002) (stating that, over the past fifty years, state laws have increasingly treated posthumous commercialization of a decedent's persona as descendible).

right that includes the "unrestricted right of disposition."[71] Affirming the ability of the estate of Elvis Presley to control use of his name and likeness, the court labeled the right a "species of intangible personal property."[72] Similarly, the estate of a child actor was allowed to proceed with its right of publicity suit because the court deemed the right to be a property right under New Jersey law.[73] Other courts construed "celebrity goodwill" as property subject to equitable distribution upon dissolution of a marriage.[74] State statutes took the same propertization path. Kentucky's right of publicity statute, enacted in 1984, explicitly described the right as a "property right."[75] Texas did the same, placing its right of publicity statute in its property code and defining it as a "property right."[76]

This maneuver, labeling the right as "property," also allowed the right to be extracted from its right of privacy origins. The right of privacy is conceptualized as a "personal" right rather than as a "property" right.[77] As a result, one cannot assign their interest in preventing defamation to a third party or pass it on to one's heirs after death. But courts in the 1980s were careful to explain that the right of publicity and the right of privacy were two different things. In a lengthy exegesis of the doctrine, the *Crowell* court emphasized the differences between the right of publicity and the right of privacy, explaining that Warren and Brandeis had created the right of privacy for a far different purpose than the right of publicity and that the publicity right had "to step out of the shadow of its more well known

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[71] State v. Crowell, 753 S.W.2d 89, 96–97 (Tenn. Ct. App. 1987).

[72] *Id.* at 97.

[73] McFarland v. Miller, 14 F.3d 912, 916–18 (3d Cir. 1994) ("Executors and administrators may have an action for any trespass done to the person or property . . . of their testator or intestate against the trespasser . . . .") (quoting N.J. STAT. ANN. § 2A:15-3 (West 1987)); *see also* Grant v. Esquire, 367 F. Supp. 876, 880 (S.D.N.Y. 1973) (comparing appropriation of persona to a trespass on land).

[74] Piscopo v. Piscopo, 555 A.2d 1190, 1193 (N.J. Super. 1988) (holding that "celebrity goodwill" is an asset which is distributable upon dissolution of marriage if it is acquired during the marriage); Elkus v. Elkus, 572 N.Y.S.2d 901, 904–05 (App. Div. 1991) (reversing a lower court decision which determined that the plaintiff's celebrity status was not "marital property" subject to equitable distribution); Golub v. Golub, 527 N.Y.S.2d 946, 950 (Sup. Ct. 1988) ("The noncelebrity spouse should be entitled to a share of the celebrity spouse's fame, limited . . . by the degree to which the fame is attributable to the noncelebrity spouse.") (citing Gary S. Stiffelman, *Community Property Interests in the Right of Publicity: Fame and/or Fortune*, 25 UCLA L. REV. 1095, 1127–28 (1978)); *see also* Allen M. Parkman, *Human Capital as Property in Celebrity Divorces*, 29 FAM. L.Q. 141, 141–42 (1995) (discussing expansion of the definition of marital property to include "celebrity status").

[75] KY. REV. STAT. ANN. § 391.170 (West 2006) (recognizing property rights in a person's name and likeness which are entitled to protection from commercial exploitation); *see also* JOSHUA GAMSON, CLAIMS TO FAME: CELEBRITY IN CONTEMPORARY AMERICA 45 (1994) (discussing increasing use of the terms "property" and "merchandise" in popular culture to describe celebrity beginning in the 1950s); Joshua Gamson, *The Assembly Line of Greatness: Celebrity in Twentieth-Century America*, 9 CULTURAL STUD. MASS COMM. 1, 14 (1992) (same).

[76] TEX. PROP. CODE ANN. § 26.002 (West 2000).

[77] Jacoby & Zimmerman, *supra* note 70, at 1322.

cousin."[78] Similarly, the Tenth Circuit articulated a "distinction between the personal right to be left alone and the business right to control use of one's identity in commerce."[79]

At the same time, judicial attitudes as to what should be part of a protectable persona shifted. Courts chose to make voice, like name or likeness, part of the celebrity property right, even if the secondary use was only a close imitation.[80] In 1988, the Ninth Circuit found that Bette Midler had a viable state common law right of publicity claim against Ford Motors for using an imitation of her voice.[81] The court explained that "[t]o impersonate her voice is to pirate her identity."[82] Four years later, the Ninth Circuit affirmed a jury award of over two million dollars for Frito-Lay's impersonation of singer Tom Waits' voice in a commercial.[83] "[A] well-known singer with a distinctive voice has a property right in that voice," the court stated.[84] Other courts adopted the same reasoning.[85] A related line of cases held that using actors bearing a striking resemblance to a celebrity in commercial activities violated the right of publicity.[86] The right now extended not just to uses of the celebrity's inherent attributes like appearance or voice, but to imitations of those attributes.

Courts also recognized claims based on the use of objects associated with a famous person. When game show hostess Vanna White sued Samsung Electronics for its advertisement featuring a robot dressed in a blond wig, gown, and jewelry standing next to a letter board resembling the one used on Wheel of Fortune, the Ninth Circuit held in her favor.[87] In

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[78] State v. Crowell, 733 S.W.2d 89, 93 (Tenn. Ct. App. 1987).

[79] Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 967 (10th Cir. 1996) (internal citation omitted); *see also* Oklahoma Natural Gas Co. v. LaRue, Nos. 97-6093, 97-6224, 97-6087, 1998 WL 568321, at *8 (10th Cir. Sept. 1, 1998) ("Differing from the right of privacy, or the right to be left alone, the right of publicity provides the ability 'to control use of one's identity in commerce.'") (quoting *Cardtoons*, 95 F.3d at 967); Crump v. Beckley Newspapers, Inc., 320 S.E.2d 70, 82, 85 n.6 (W. Va. 1984) (distinguishing right of privacy, which "protects individual personality and feelings," from right of publicity, "which remedies the unjust enrichment caused by an unauthorized exploitation of the good will and reputation that a public figure develops in his name or likeness").

[80] 1 MCCARTHY, *supra* note 22, § 4:78 (describing "[a] new era of judicial attitude and analysis towards sound-alikes" beginning in 1988).

[81] Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988) ("We hold only that when a distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product, the sellers have appropriated what is not theirs and have committed a tort in California.").

[82] *Id.* at 463.

[83] Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1096 (9th Cir. 1992).

[84] *Id.* at 1105.

[85] *E.g.*, Prima v. Darden Restaurants, Inc., 78 F. Supp. 2d 337, 393–94 (D.N.J. 2000) (holding that an award-winning musician had a property right in his voice and singing style).

[86] *E.g.*, Prudhomme v. Procter & Gamble Co., 800 F. Supp. 390, 393–94 (E.D. La. 1992); Allen v. Men's World Outlet, Inc., 679 F. Supp. 360, 370 (S.D.N.Y. 1988); Allen v. Nat'l Video, Inc., 610, F. Supp. 612, 629–30 (S.D.N.Y. 1985).

[87] White v. Samsung Elec. Am., Inc., 971 F.2d 1395, 1399 (9th Cir. 1992).

a few previous decisions, courts had recognized right of publicity claims outside of appropriations of name, photograph, or voice.[88] But here the court recognized such a claim when there was no affirmative representation that the person depicted in the commercial was in fact the plaintiff.[89] Thus, merely referencing a celebrity could now trigger liability.[90]

In a short period of time, then, three doctrinal innovations radically altered the right of publicity. First, the right became descendible, greatly strengthening the economic hand of celebrities trying to trade on their fame with merchandisers. Second, courts finally divorced the right from its privacy origins, freeing it from previous limitations on relief for non-dignitary harms. Third, courts chose to broaden the aspects of persona protected by the right, eventually deciding to protect anything used by another that might "identify" the celebrity.[91] These changes happened over three decades after the right was originally introduced in 1953. The remainder of this Article describes the cultural context in which these changes occurred and how that context affected lawmakers and judges.

III. COMMODIFYING CELEBRITY

As discussed above, the rights held by celebrities in the 1950s and

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[88] *See* Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 822, 827 (9th Cir. 1974) (holding that a race car driver had a right of publicity in the distinctive design of his race car); Ali v. Playgirl, Inc., 447 F. Supp. 723, 725–29 (S.D.N.Y. 1978) (holding that Muhammad Ali had a right of publicity claim against *Playgirl* Magazine, in part, for the unauthorized use of his nickname "The Greatest").

[89] *See White*, 971 F.2d at 1403. Simultaneously, courts expanded the bounds of trademark infringement law, relaxing trademark doctrine to better accommodate celebrity plaintiffs. Congressional revision of the Lanham Act in 1988 transformed section 43(a) into a powerful weapon, providing causes of action for infringement of unregistered trademarks as well as false advertising. Celebrity plaintiffs used both causes of action to halt unwanted uses of their personas. Joshua Beser, Comment, *False Endorsement or First Amendment?: An Analysis of Celebrity Trademark Rights and Artistic Expression*, 41 SAN DIEGO L. REV. 1787, 1804 (2004) ("Since the mid-1980s, courts have increasingly recognized celebrities' claims under the Lanham Act as unregistered trademarks protected by section 43(a)."); *see, e.g.*, Parks v. LaFace Records, 329 F.3d 437, 447 (6th Cir. 2003) (finding that civil rights icon Rosa Parks had a trademark interest in her name); King v. Innovation Books, 976 F.2d 824, 829 (2d Cir. 1992) (finding for author Stephen King on his false advertising claim for a false "possessory credit" in motion picture); Vanderbilt v. Rolls-Royce Motor Cars, Inc., No. 88 CIV. 8263 (SWK), 1990 WL 37825, at *1–4 (S.D.N.Y. Mar. 28, 1990) (finding that a member of the Vanderbilt family had standing to sue under the Lanham Act when his name was misappropriated in a Rolls-Royce advertisement); *Allen*, 610 F. Supp. at 624–25 (holding that use of a Woody Allen look-alike in an advertisement was in violation of the Lanham Act).

[90] Even using a baseball pitcher's distinctive stance in an advertisement was deemed actionable. *See* Newcombe v. Adolf Coors Co., 157 F.3d 686, 691–93 (9th Cir. 1998) (finding that a pitcher's stance rendered him identifiable and could be the basis for a cause of action for commercial misappropriation).

[91] *See* 1 MCCARTHY, *supra* note 22, § 3.18 (stating that "[i]dentifiability . . . is a central element of a right of publicity claim").

1960s were not nearly as powerful as the rights they wielded in the 1980s and 1990s. In a short period of time, the right of publicity morphed from a limited personal right protecting a living celebrity's name and likeness into an expansive, descendible property right that extended to all aspects of persona. Legal scholars tie the right's growth to the increasing economic importance of celebrity. Their argument is straightforward: once celebrity reached a critical amount of commercial value in the mid-twentieth century, judges believed they had no choice but to recognize that value.[92]

Courts were aware of the financial advantages of celebrity throughout the twentieth century. It was no secret that advertisers were willing to pay handsomely to use celebrity names and pictures to stimulate demand for their merchandise.[93] One of the earliest publicity cases involved Thomas Edison suing for the unauthorized use of his name and likeness on a type of pain relief medicine.[94] In finding for the famous inventor, the court explained that one's name and "the peculiar cast of one's features" may have a "pecuniary value" that belongs to a single individual.[95] By the middle of the century, the commercial significance of fame was well understood.[96] The *Haelan* decision, credited with coining the term "right of publicity," maintained that it was "common knowledge" that many actors and professional athletes capitalize on their fame through advertisements that further emphasize their celebrity.[97]

But judicial acknowledgement of celebrity's financial value does not explain the right's dramatic expansion in the century's last two decades. If judges knew about fame's economic importance in the 1950s, then why was this expansion delayed for thirty years? For that matter, the Edison case (and others) demonstrate legal awareness of celebrity's value decades before the right's creation and nearly a century before the right became descendible. If all it took for the creation of a new property right was judicial recognition of economic value, the right of publicity should have become a part of American law much earlier.

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[92] *See supra* note 5 and accompanying text; *see also* P. David Marshall, *Introduction*, *in* THE CELEBRITY CULTURE READER, *supra* note 8, at 1, 6 ("Branding public identity is a clear translation of a personality into a commodity that is brokered and exchanged throughout the extended entertainment industry."); Timothy P. Terrell & Jane S. Smith, *Publicity, Liberty, and Intellectual Property: A Conceptual and Economic Analysis of the Inheritability Issue*, 34 EMORY L.J. 1, 12 (1985) ("[T]he idea of 'valuableness' or 'pecuniary value' has been the key element in the widespread recognition of the right.").

[93] *See* O'Brien v. Pabst Sales Co., 124 F.2d 167, 171 (5th Cir. 1941) (Holmes, J., dissenting) ("[Advertisers] are undoubtedly in the habit of buying the right to use one's name or picture to create demand and good will for their merchandise.").

[94] Edison v. Edison Polyform Mfg. Co., 67 A. 392, 392 (N.J. Ch. 1907).

[95] *Id.* at 394.

[96] STUART EWEN, ALL CONSUMING IMAGES: THE POLITICS OF STYLE IN CONTEMPORARY CULTURE 98 (1988); Madow, *supra* note 2, at 163, 166.

[97] Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953).

Instead, the story is more nuanced and requires an examination of the history of celebrity on multiple fronts. Subsequent parts of this Article examine how celebrity came to appear more democratic and rational to lawmakers and to the general public. This Part traces how celebrity was viewed economically in the 1980s and 1990s. Technological change altered the financial understanding of celebrity in two key ways. First, the perceived value of celebrity skyrocketed as media proliferation and globalization placed a higher premium on being famous. Second, television caused the rewards of celebrity to shift their location from movie studios and sports leagues to the famous individual herself. Both of these changes had a dramatic impact on how the public and the legal elite assessed celebrity's economic implications.

A. *Celebrity Gains in Value*

Celebrity surely had commercial value throughout the twentieth century, but in the 1980s technology caused that value to increase exponentially. Celebrities began to sign massive endorsement deals that dwarfed the payments they received for actually performing on the screen or in the sporting arena.[98] Famous people have long been used as commercial spokespersons, but it was only in recent years that such endorsements eclipsed the compensation received for "professional" activities. For example, Mickey Mantle received only $1,500 for lending his name to a chewing gum manufacturer in 1961.[99] By contrast, Michael Jackson inaugurated a new age of celebrity advertising in 1984 when he signed a then record five million dollar sponsorship deal with Pepsi.[100] "The pact raised the price tag for celebrity pitchmen for years to come, and cleared the way for a wave of star-studded commercials . . . ."[101] A year later, Nike entered into a partnership with basketball player Michael Jordan that not only rewarded him handsomely for appearing in its commercials, but also enhanced his fame by using cinematic techniques to turn him from an athlete into an entertainer.[102] The next year, Coca-Cola paid Bill Cosby twenty-five million dollars to serve as its spokesperson.[103] It quickly became commonplace for the biggest stars to leverage their fame through multi-million dollar endorsement deals.[104] When NBA star Allen Iverson

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[98] *See* Robert A. Swerdlow & Marleen R. Swerdlow, *Celebrity Endorsers: Spokesperson Selection Criteria and Case Examples of FREDD*, 7 ACAD. MKTG. STUD. J. 13, 14 (2003) (discussing the increasing use of celebrity endorsements in advertising).

[99] KERRY SEGRAVE, ENDORSEMENTS IN ADVERTISING: A SOCIAL HISTORY 101 (2005).

[100] Suzanne Vranica, *Jackson Popularized Celebrity Ads*, WALL ST. J., June 29, 2009, at B5.

[101] *Id.*

[102] NAOMI KLEIN, NO LOGO 51–52 (2002).

[103] *E.F. Hutton's Spokesman Idea a 'Cos' Celebre*, ADVERTISING AGE, Apr. 21, 1986, at 1.

[104] Other blockbuster endorsement deals of the time include Madonna's agreement with Pepsi in 1989 and Shaquille O'Neal's deal with Reebok in 1993. *See* Sid Bernstein, *True Stardom*,

entered into a fifty million dollar deal with a shoe manufacturer in 1996, his coach quipped, "[t]he company Allen's with is Reebok, not us."[105]

Two forces permitted the change in celebrity value. The first was a proliferation of media outlets that began in the 1980s, when the public suddenly had access to a vastly wider array of media than ever before.[106] A television viewer in the 1970s only had a few channels to pick from; just a few years later, cable television and home video devices offered hundreds of simultaneous viewing possibilities.[107] To provide the needed content for these new entertainment outlets, media companies needed celebrities. They invested in a range of programming formats designed to create and emphasize fame.[108] The new technologies increased celebrity worth as entertainers and athletes could make themselves known to a much greater number of consumers than their predecessors.[109] The proliferation of ways for celebrities to publicize themselves also amplified the attractiveness of celebrity endorsers as famous faces could cut through the media clutter. By the middle of the decade, approximately twenty percent of all television commercials featured a famous person,[110] and celebrity endorsement deals comprised ten percent of all of the money spent on television advertising.[111]

Globalization also changed the economic calculus of fame and, again, technology was a driving force. As information could be shared across continents in increasingly compact, cost-effective ways, massive media conglomerates seized on celebrities as a way to translate their content across different media platforms and different cultural environments.[112]

ADVERTISING AGE, Feb. 16, 1989, at 16 (noting Madonna's 1989 agreement with Pepsi); Ken Rappoport, *O'Neal Appeal: Big Deal*, L.A. TIMES, Apr. 18, 1993, at C1 (discussing O'Neal's long-term advertising contracts worth seventy million dollars).

[105] Michael Bamberger, *Mining Woods for Gold*, SPORTS ILLUSTRATED, Sept. 25, 2000, at 27.

[106] *See* CASHMORE, *supra* note 4, at 38–39 (discussing the transformative role of television in creating celebrity culture); DAVID GILES, ILLUSIONS OF IMMORTALITY: A PSYCHOLOGY OF FAME AND CELEBRITY 32 (2000) (describing how the expansion of mass media has contributed to the creation of celebrities); JAKE HALPERN, FAME JUNKIES: THE HIDDEN TRUTHS BEHIND AMERICA'S FAVORITE ADDICTION, at xx–xxi (2007) (discussing the increasingly broad range of programming available on cable television).

[107] HALPERN, *supra* note 106, at xx-xxi.

[108] NEW KEYWORDS: A REVISED VOCABULARY OF CULTURE AND SOCIETY 27–28 (Tony Bennett et al. eds., 2005). A person living in pre-World War II America could go days without ever seeing a celebrity, but this was no longer true decades later when the average home had access to channel after channel devoted to celebrities. *See* HALPERN, *supra* note 106, at xx-xxi (discussing the increasing public access to celebrity-focused publications and cable television shows).

[109] The author thanks Greg Mandel for his helpful discussion on this point.

[110] *See* Pat Sloan & Stuart J. Elliot, *Adwhirl*, ADVERTISING AGE, July 13, 1987, at 88.

[111] *See* Stratford P. Sherman, *When You Wish Upon a Star*, FORTUNE, Aug. 19, 1985, *available at* http://money.cnn.com/magazine/fortune_archive/1985/08/19/66318/index.htm).

[112] *See* NEIL GABLER, THE NORMAN LEAR CENTER, TOWARD A NEW DEFINITION OF CELEBRITY 10–11 (2001) (describing how the adaptable nature of celebrity is used to sell magazines, television, newspapers, books, and online content); *see also* KLEIN, *supra* note 102, at 57 (2002) (discussing the

Thus, instead of MGM trying to use Greta Garbo and Joan Crawford to sell tickets for *Grand Hotel* in the United States, vertically integrated media corporations used a star like Arnold Schwarzenegger to sell books, CDs, DVDs, television rebroadcasts, television spin-offs, theme park attractions, as well as tickets for the next *Terminator* movie both in the United States and overseas. Globalization also allowed celebrities concerned with the clash between commercialization and artistic integrity to have it both ways, as they could receive massive paydays for appearing in commercials in countries like Japan—where they were unlikely to face criticism—while refusing to appear in advertisements at home.[113]

Perhaps the most significant change in the commercial power of fame was not in its magnitude, but in its fluidity. Commodities are those objects that have an economic value determined by reciprocal exchange.[114] In prior decades, fame was not a true commodity because its primary value was tied to one's abilities as an actor or athlete, making it difficult to transfer this value to others. Admittedly, early twentieth century celebrities did enter into endorsement deals. But the scope and amount of these endorsement deals were limited. Studios policed their stars' outside commercial appearances to make sure they tightly matched their on-screen personas.[115] Athletes of the era shilled for sporting equipment and certain "manly" vices, but most other products were considered too far removed from their athletic personas.[116] Given these limitations and the relatively low value of celebrity endorsement deals at the time, the ability to use one's name and likeness to sell goods seemed like a worthwhile sideline, but not the main financial benefit of being a movie star or athlete.

By the 1980s, the remunerative value of celebrity was no longer

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media versatility of celebrity athletes); GRAEME TURNER, UNDERSTANDING CELEBRITY 32–33 (2004) (explaining how transnational companies have expanded by diversifying their holdings, particularly by expanding into entertainment platforms).

[113] *See* SEGRAVE, *supra* note 99, at 112–13 (presenting a list of Western celebrities who participated in advertisement campaigns in Japan, including Sylvester Stallone for Kirin beer, Paul Newman for Nissan, and Madonna for Mitsubishi Electric); *see also* Malena Watrous, *How U.S. Stars Sell Japan to the Japanese*, SALON.COM, June 29, 2000, http://www.salon.com/2000/06/29/japoncelebs/ (explaining how many American celebrities, and particularly Arnold Schwarzenegger, continue to perform in Japanese commercials, even as they refuse to do so in the United States).

[114] *See* Arjun Appadurai, *Introduction: Commodities and the Politics of Value*, *in* THE SOCIAL LIFE OF THINGS: COMMODITIES IN CULTURAL PERSPECTIVE 3, 3 (Arjun Appadurai ed., 1986) (explaining that commodities can be defined as entities possessing economic value).

[115] *See infra* Section III.B.

[116] *See* Craig T. Bogar, *Trends in Product Endorsements by Athletes*, 17 SPORT DIGEST no. 1, 2010, *available at* http://thesportdigest.com/archive/article/trends-product-endorsements-athletes (explaining that athletes in the earlier part of the century rarely advertised products that were not related to their sport, while current sports endorsements cover a wide breadth of products unrelated to sports).

tethered to one's accomplishments.[117] Now what mattered was becoming famous; how one achieved this fame was less important. Once fame had been achieved, earlier career paths could be abandoned, as the essential task became keeping oneself in the public eye. Consultants advised celebrities to "extend their brand" by leveraging their fame in one commercial area to become known in a completely different one.[118] Examples from the time include golfer Greg Norman, who translated his 1980s fame as a professional golfer into vitaculture; actor Paul Newman, who used his acting renown to sell his own line of food products; and model Kathy Ireland, who built a one billion dollar business selling a variety of retail products including apparel, flooring, and lighting.[119] In the 1990s, a parade of hip-hop artists began their own clothing lines.[120] Soon thereafter a host of celebrities, particularly female singers, started offering their own signature fragrances.[121] Some celebrities even took steps to securitize their identities by offering publicly traded bonds backed by the entertainer's own fame and iconic status.[122]

Legal authorities commented on the changes to celebrity value, particularly its newly fluid nature. As the Court of Appeals for the District of Columbia noted in 1987, modern celebrities "are frequently so famous that they may be able to transfer their recognition and influence from one field to another."[123] Other courts recognized that the economic value of celebrity endorsements now outweighed whatever benefits accrued from the events that made the celebrity famous in the first place.[124]

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[117] *See* NEW KEYWORDS, *supra* note 108, at 27–28 (explaining that being a "star" typically entails an accretion of performance accomplishments over time, but "celebrities" are not required to build this foundation).

[118] *See* Chris Grannell & Ruwan Jayawardena, *Celebrity Branding: Not as Glamorous as It Looks*, BRAND CHANNEL, January 19, 2004, *available at* http://www.brandchannel.com/brand_speak.asp?bs_jd=76.

[119] *See* John Tozzi, *Celebrity Entrepreneurs*, BUS. WEEK, June 20, 2007, *available at* http://www.businessweek.com/smallbiz/content/june2007/5b20070620.093752.htm (describing how different celebrities extended their brand into other markets).

[120] *See* Emil Wilbekin, *Great Aspirations: Hip Hop and Fashion Dress for Excess and Success*, *in* THE VIBE HISTORY OF HIP HOP 280, 283 (1999) (listing the hip-hop stars that started their own clothing lines).

[121] *See* CHANDLER BURR, THE PERFECT SCENT: A YEAR INSIDE THE PERFUME INDUSTRY IN PARIS AND NEW YORK, at xxi (2007) (listing the celebrities who started their own perfume brands, including Gwen Stefani, Céline Dion, Shania Twain, and Kate Moss).

[122] *See* IRVING J. REIN ET AL., HIGH VISIBILITY 238 (1997); *see also* Jacoby & Zimmerman, *supra* note 70, at 1331 (describing how David Bowie started the celebrity trend of securitizing one's identity); Daniel Kadlec, *Banking on the Stars*, TIME, June 2000, *available at* http://www.time.com/time/magazine/article/0,9171,998239,00.html (noting how in 1997, David Bowie offered "Bowie Bonds," with other celebrity musicians like James Brown and Marvin Gay soon following suit).

[123] Tavoulareas v. Piro, 817 F.2d 762, 772 (D.C. Cir. 1987) (internal quotations omitted).

[124] *See* Jim Henson Prods., Inc. v. John T. Brady & Assocs., 867 F. Supp. 175, 189 (S.D.N.Y. 1994) (stating that "in an age where star athletes make tenfold more from their endorsement contracts than from their team salaries, it denies reality to believe other than that an individual's persona can

As fame came to be perceived more like a true commodity, courts began to view celebrity as an essential part of modern capitalism. Even though celebrities and their licensees only enjoy some of their economic prosperity by virtue of decisions in favor of strong, descendible publicity rights, courts and commentators have cited reliance on such legal protections as a primary reason for continuing the right's expansion.[125] Judges also expressed concern in their decisions for the role of celebrity protections in bolstering the American economy.[126] In their view, a regime that does not robustly safeguard celebrity interests threatens international trade.[127] Likewise, legislatures in the 1980s and 1990s explicitly recognized the newly fluid nature of celebrity value and stressed the need to rewrite the law to capture this value for state coffers. The House sponsor of Texas's postmortem statute, passed in 1987, explained that "it is important for us in our economic development in our state to provide some protections for entertainers"[128] and extolled the bill's potential to make Texas "the third coast in the entertainment industry."[129] Similarly, Washington's legislature noted the growing economic importance of celebrity endorsements and adopted its law to encourage business relocation.[130] Nevada legislators noted that such a law would encourage Las Vegas entertainers to keep their estates, "the focal centers for the control of assets that survive long after their death," in Nevada.[131] In the past, one's fame could be protected by safeguarding the conditions of the celebrity's original livelihood. Now, however, fame had a value of its own, and legal authorities began to take steps to retain that value within their jurisdictions.

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constitute valuable economic property"); *see also* State v. Crowell, 733 S.W.2d 89, 94 (Tenn. App. 1987) (discussing the new world of commercial exploitation of celebrities and the lucrative world of celebrity endorsements as "economic reality"). In contrast, a court in 1959 commented that one's name could never be a "commodity." Application of N.Y. Braves Baseball Club, 195 N.Y.S.2d 80, 83 (Sup. Ct. 1959).

[125] *See* Kwall, *supra* note 16, at 199; Bela G. Lugosi, *California Expands the Statutory Right of Publicity for Deceased Celebrities While Its Courts are Examining the First Amendment Limitations of that Statute*, 10 DEPAUL-LCA J. ART & ENT. L. POL'Y 259, 271 (2000); *see also* Commentary by New York Senator Emanuel R. Gold on N.Y.S.B. 155, N.Y. 218th General Assembly, 1st Sess. (1995) (on file with author) (arguing that a publicity rights law was needed in New York because "[a]n entire industry has developed around the merchandising and commercial exploitation of celebrities").

[126] *See, e.g.*, *Crowell*, 733 S.W.2d at 92, 94 (emphasizing the "economic reality" of the large market that had already developed for celebrity merchandise in deciding to recognize postmortem common law right).

[127] *See* Zimmerman, *supra* note 5, at 51.

[128] Audio tape: Texas House of Representatives, Floor Debate (Apr. 9, 1987) (on file with the author).

[129] Audio tape: Texas House of Representatives, Judicial Affairs Committee (Mar. 11, 1987) (on file with the author).

[130] H.R. Rep. No. 55-1074, at 5 (Wash. 1998).

[131] *Minutes of the Assembly Committee on Commerce*, 65th Nev. Leg., exhibit D, June 16, 1989 (on file with the author).

B. *Celebrities Take Financial Control*

Although the increasing value of celebrity encouraged courts to recognize publicity rights, it was not enough. Another barrier to fuller recognition of celebrity rights can be traced to understandings of where the economic power of celebrity was located. In the first half of the twentieth century, "film performers were essentially studio owned-and-operated commodities."[132] The studios exercised tight control over their stars, designing their personalities and scripting their publicity.[133] Some studio contracts even prohibited public laughter.[134] A close match between on-screen and off-screen personas was designed to assure audiences of the star's authenticity.[135] Because performers often played larger-than-life heroes and heroines, their off-screen personalities had to seem larger than life as well.

As part of this process, studios held legal control over celebrity identities.[136] Box office stars worked under contracts that allowed the star's name, voice, and likeness to be used to promote studio films and even to be licensed for product endorsements without the star's approval.[137] "Movie studios could use a star's image as it related to a particular film, and could license that image to businesses that produced greeting cards, toys, and a myriad of other kinds of products in exchange for a royalty payment to the star image's owner, by outside businesses."[138] During this period, except for a rare few, such as Shirley Temple and Roy Rogers, film celebrities lacked the ability to control uses of their image by the movie studios, and, therefore, only received a fraction of their persona's overall commercial worth.[139] For example, the studios agreed to

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[132] GAMSON, *supra* note 75, at 5; *see also* DREW PINSKY & S. MARK YOUNG, THE MIRROR EFFECT: HOW CELEBRITY NARCISSISM IS SEDUCING AMERICA 33 (2009) ("Stars were little more than well-paid employees who could be rented or sold to other studios for profit.").

[133] *See* GAMSON, *supra* note 75, at 5 (explaining how studios controlled their stars' exposure to the public).

[134] *See id.* at 25 (noting that Buster Keaton's contract prohibited him from laughing in public).

[135] *See* Cathy Klaprat, *The Star as Market Strategy: Bette Davis in Another Light*, *in* THE AMERICAN FILM INDUSTRY 351, 365–67 (Tino Bailo ed., 1985) (describing how the studio controlled every aspect of Bette Davis's image).

[136] PINSKY & YOUNG, *supra* note 132, at 33.

[137] *See* McLeod, *supra* note 8, at 653 ("Contracts enabled movie studios to use a star's name, voice and likeness to promote the film, and more underhandedly, it allowed for the use of a star's image to be licensed for product endorsements, even in the most questionable and tangential circumstances."); *see also* K.L. Lum et al., *Signed, Sealed and Delivered: "Big Tobacco" in Hollywood, 1927–1951*, 17 TOBACCO CONTROL 313, 318 (2008) (describing studio control over celebrity cigarette testimonials).

[138] McLeod, *supra* note 8, at 653; *see also* SEGRAVE, *supra* note 99 at 23 ("Some contracts included a clause stating that the stars would not sign any testimonials except through the film studio's manager or publicity director. On the other hand, the studio could sign for the star.").

[139] *See* McLeod, *supra* note 8, at 653 (describing how Shirley Temple and Roy Rogers capitalized on their fame through various merchandising and licensing arrangements).

allow Lux soap to run advertisements featuring hundreds of famous female film stars without paying the actresses a dime.[140] In addition to being unable to realize the full value of their celebrity in the endorsement market, film stars received salaries rather than a percentage of a film's profits.[141] Although the studios attempted to mask any signs of labor struggle, the public quickly became aware of their controlling hand. Bette Davis very publicly protested what she saw as forced placement in mediocre films in the 1930s.[142] The Screen Actors Guild staged a protest in the 1950s in an effort to prevent the studios from typecasting actors.[143] James Cagney and Olivia de Haviland took the studios to court in an effort to break out of their long-term contracts.[144]

As a result of the "significant hold" of the studios over their stars,[145] it was difficult for courts to justify the right of publicity in a manner similar to other intellectual property rights. The primary argument used today for awarding private control over celebrity personas is an incentive one,[146] matching the theoretical justification behind other types of intellectual property like copyright and patents.[147] According to this view, by giving celebrities legal authority over commercial use of their image, the law encourages others to develop their own rich cultural personalities with the knowledge that they will be able to capture the benefits of their investment.[148] Yet the structure of the entertainment industry in the first half of the twentieth century made it hard to believe that an award of publicity rights would incentivize the creation of new captivating personas. Stars operated within a regime that placed economic and creative control in

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[140] SEGRAVE, *supra* note 99, at 189–90.

[141] RICHARD SCHICKEL, INTIMATE STRANGERS: THE CULTURE OF CELEBRITY 96 (1985) (noting that many celebrities resented the disparity between their salary and what studios were making off of their work).

[142] *See* Allen Larson, *Movies and New Constructions of the American Star*, *in* AMERICAN CINEMA OF THE 1930S: THEMES AND VARIATIONS 182, 184 (Ina Rae Hark ed., 2007).

[143] *Typecasting Protested by Actors Guild*, L.A. TIMES, Mar. 27, 1950, at 17.

[144] Emily S. Carman, *Independent Stardom: Female Film Stars and the Studio System in the 1930s*, 37 WOMEN'S STUD. 583, 588 (2008).

[145] Nicola Simpson, *Coming Attractions: A Comparative History of the Hollywood Studio System and the Porn Business*, 24 HIST. J. FILM, RADIO, & TELEVISION 635, 639 (2004).

[146] Wall, *supra* note 28, at 56 (providing an example of the current view taken by the courts); *see also* Matthews v. Wozencraft, 15 F.3d 432, 437 (5th Cir. 1994) ("Protecting one's name or likeness from misappropriation is socially beneficial because it encourages people to develop special skills, which then can be used for commercial advantage."); Dogan & Lemley, *supra* note 2, at 1186–90 (describing and criticizing the argument that the right of publicity is necessary "to encourage investment in the development of a public persona").

[147] *See* Christopher A. Cotropia & James Gibson, *The Upside of Intellectual Property's Downside*, 57 UCLA L. REV. 921, 922 & n.2 (2010) (stating that patent and copyright law follow the incentive model).

[148] *See* White v. Samsung Elec. Am., 971 F.2d 1395, 1404–05 (9th Cir. 1992) (Alarcon, J., dissenting) (discussing the evolving case law).

the hands of non-celebrities.[149] Publicity rights inured to the benefit of movie studios, not those actually responsible for creating new personas.[150] The early cases and commentary did not discuss incentives when evaluating publicity rights. Instead, unjust enrichment of the defendant or harm to the dignitary interests of the plaintiff was stressed.[151] The problem for celebrities, however, was that a focus on dignitary interests did not counsel in favor of strong protections.[152]

Beginning in the 1950s, this all began to change as the celebrities themselves came to exercise more control over their careers and the commercial use of their personas. Again, technological change was an integral part of the story as the new medium of television helped end the period of control over performer images by shrinking movie audiences and introducing a new competitor to the studios.[153] Meanwhile, an antitrust decree forced the studios to divest themselves of their interest in theaters, dramatically reducing box office revenue and weakening their bargaining position with celebrities.[154] With the studios no longer completely controlling publicity for their actors, agents stepped in to shepherd their clients through the media production system.[155] The agents and their clients had different publicity objectives than the studio heads. Whereas the studios were most concerned about publicizing their films, "[t]he agent's fundamental intention is to construct the star as a clearly separate economic entity, quite distinct from any individual film or any studio."[156] In other words, celebrity publicity's fundamental purpose became economic independence for the individual star. By highlighting the actor's own gifts, the agent could position the star for other projects and distance her from a particular studio or type of role. As a result, celebrities of the

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[149] *See* SCHICKEL, *supra* note 141, at 96–97 (describing the extensive control that studios were able to exert over their actors).

[150] *Id.* at 96.

[151] *See, e.g.*, Pavesich v. New England Life Ins. Co., 50 S.E. 68, 80–81 (Ga. 1905) (describing the emotional harms to plaintiff from unauthorized advertising); Palmer v. Schonhorm Enters., Inc., 232 A.2d 458, 462 (N.J. Sup. Ct. 1967) (speculating that "the basic and underlying theory" behind the right of publicity is to protect the celebrity plaintiff from "unjustified interference"); Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 987–88 (1964) (justifying action against commercial uses of a person's name or photograph for the resulting injury "to the sense of personal dignity"); Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 331 (1966) (maintaining that the rationale for the right of publicity "is the straightforward one of preventing unjust enrichment by the theft of good will").

[152] *See supra* Section II.A.

[153] SCHICKEL, *supra* note 141, at 97.

[154] *See* Greg Snodgrass, *Business Solutions to the Alien Ownership Restriction*, 61 FED. COMM. L.J. 457, 461–63 (2009) (discussing United States v. Paramount Pictures, 334 U.S. 131 (1948)).

[155] P. DAVID MARSHALL, CELEBRITY AND POWER: FAME IN CONTEMPORARY CULTURE 84–85 (1997).

[156] *Id.* at 84.

1960s and 1970s began to present their talents in a different way than they had before when their public personas were under studio control. Entertainers began to stress their own creativity in performance, deemphasizing outside instruction and emphasizing internal resources.[157] Method acting allowed the film star to argue that she was not just a performer in a system orchestrated by others, but rather someone involved in a great individual, artistic endeavor, just like a writer or a painter.[158] With the individual entertainer coming to exercise sole dominion over the management of her public life, there was a stronger argument for allowing her to capture the full benefits of economic use of her image.

Legal decisions regarding publicity rights changed to reflect the understanding that celebrities now managed their own personas. With control over publicity in the hands of the celebrity, courts could begin to tell a story of incentives when justifying an award of rights in persona to one individual. The Supreme Court, in its only treatment of the right of publicity, explained in 1977 that "the protection [afforded by state right of publicity laws] provides an economic incentive for [the artist] to make the investment required to produce a performance of interest to the public. This same consideration underlies the patent and copyright laws."[159] The First Circuit also maintained that the right's goal was "rewarding individual effort."[160] According to the Seventh Circuit in 1986, "[t]he reason that state law protects individual pecuniary interests [via the right] is to provide an incentive to performers to invest the time and resources required to develop such performances."[161]

This shift to a focus on using legal privileges to encourage the development of celebrity fit nicely with a larger trend in legal thought that emphasized the importance of designing legal rules to facilitate markets and wealth maximization.[162] Beginning in the late 1970s and early 1980s, jurists and academics, such as Richard Posner and Gary Becker, began arguing that economic theory could best explain human behavior and called for the logic of markets to be employed in a variety of socio-legal contexts such as discrimination, drug addiction, and adoption.[163] Rather than just describing the best approach to certain economic or political

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[157] *See id.* at 88–89.

[158] SCHICKEL, *supra* note 141, at 98.

[159] Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 576 (1977).

[160] Bi-Rite Enters., Inc. v. Bruce Miner Co., Inc., 757 F.2d 440, 444–45 (1st Cir. 1985).

[161] Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n, 805 F.2d 663, 678 (7th Cir. 1986); *see also* Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 837 (6th Cir. 1983) ("Vindication of the right will tend to encourage achievement in [the entertainer's] chosen field.").

[162] *See* Gary Minda, *The Jurisprudential Movements of the 1980's*, 50 OHIO ST. L.J. 599, 604–14 (1989) (describing the early history of the law and economics movement); *see also* Richard A. Posner, *Gary Becker's Contributions to Law and Economics*, 22 J. LEGAL STUD. 211, 212 (1993).

[163] *See supra* note 162 and accompanying text.

challenges, to these theorists, free market ideology was the appropriate paradigm for social life in general.[164] Hence, once it became accepted that law and economics principles could be applied to the world of entertainment, it made sense to use the law to encourage aspiring celebrities to engage in rational behavior that would lead to the best quality product from the celebrity marketplace. Modern courts continue to offer the same rationale of using publicity rights to incentivize the production of new public identities.[165]

In sum, although lawmakers have always recognized that celebrity has value, the way they conceptualized that value changed at the century's end. Technological and social developments produced a new economic understanding of celebrity. Now, fame was not only lucrative, but it was worth orders of magnitude more than the actual skills or performances underlying it. It became a significant part of global capitalism, and the celebrity herself could now reap its primary rewards. These changes may have allowed lawmakers to ignore some of their earlier qualms with celebrity rights. Nonetheless, other non-economic concerns over celebrity's irrational basis and its undemocratic nature had to be overcome as well before the right of publicity could resemble other types of property. Those concerns, and the manner in which they were alleviated, are discussed in Parts IV and V.

IV. RATIONALIZING CELEBRITY

Another barrier to greater legal protections for the famous was celebrity's perceived irrationality. Throughout the nineteenth and much of the twentieth centuries, a suspicion of the psychological basis of celebrity limited enthusiasm for publicity rights. Elites tied mass popularity to a more generalized fear of the destabilizing influence of groupthink. Yet by the late twentieth century, fame had become largely rationalized. The power embodied in fame began to appear quantifiable and manageable thanks to a concerted movement by public relations professionals to

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[164] Eric M. Fink, *Post-Realism, or the Jurisprudential Logic of Late Capitalism: A Socio-Legal Analysis of the Rise and Diffusion of Law and Economics*, 55 HASTINGS L.J. 931, 947 & n.103 (2004).

[165] Laws v. Sony Music Entm't, Inc., 448 F.3d 1134, 1145 (9th Cir. 2006) ("Both copyright and the right of publicity are means of protecting an individual's investment in his or her artistic labors."); Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 973 (10th Cir. 1996) ("The principal economic argument made in support of the right of publicity is that it provides an incentive for creativity and achievement."); Matthews v. Wozencraft, 15 F.3d 432, 437 (5th Cir. 1994) ("Protecting one's name and likeness from misappropriation is socially beneficial because it encourages people to develop special skills, which then can be used for commercial advantage."); *see also* N.Y. State Bar Ass'n, Trusts & Estates Law Section, Committee on Legislation, Legislation Report, June 22, 1990 ("[T]he right of publicity is seen as being analogous to a copyright. For both, creative and intellectual efforts are rewarded and encouraged . . . ."). *But see Cardtoons*, 95 F.3d at 973–74 (considering and rejecting the incentives argument).

change elite opinion and elevate their own status. Public relations, once an unsystematic approach to managing public opinion and creating celebrity, became a respected profession that employed specialized, scientific methods. These changes helped lawmakers abandon their reservations over particularized perks for the famous.

A. *Celebrity as Public Pathology*

Elites have long feared the public's adoration of the famous. In *Julius Caesar*, William Shakespeare describes the crowds that welcomed Caesar back to Rome as "worse than senseless things."[166] Fame scared many nineteenth and early twentieth century intellectuals because it suggested instability. A deep-rooted fear of the mob gripped Europe after the French Revolution, and continued into the Victorian Era.[167] As described by P. David Marshall, "crowd theorists" writing in the 1800s struggled to define the new phenomenon of mass society and how it worked.[168] According to these theorists, the problem with leaders drawing their strength from popular sentiment was that the ardor of the populace was unmanageable.[169] French social psychologist Gustave Le Bon forecast a new era dominated by "crowds," which he explained "reason falsely and are not to be influenced by reasoning."[170] The masses threatened to not only remove elites from power but also to bestow their affections on other leaders irrationally, something that struck at the stability needed for capitalist enterprise. "[O]nly by obtaining some sort of insight into the psychology of crowds" could elites understand "how slight is the action upon them of laws and institutions."[171]

As the technologies of the twentieth century allowed more and more people to gain fame, intellectuals continued to suspect that the public bestowed its favors based on illogical and socially unproductive thinking. In a theory that heavily influenced subsequent studies of celebrity,

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[166] WILLIAM SHAKESPEARE, JULIUS CAESAR, act. 1, sc. 1.

[167] *See* MARSHALL, *supra* note 155, at 29 ("[T]he threat of the seething mob born from the sentiments of equality became a cause of great concern for various elites in the nineteenth century."); Henry R. Winkler, *English Historians on the French Revolution*, 9 HIST. & THEORY 236, 240 (1970) (book review) ("They shared with their contemporaries a genuine and deep-rooted fear of the mob that was one of the hallmarks of the first half of the century.").

[168] MARSHALL, *supra* note 155, at 28 (noting that this "heralded not the birth of the crowd but the birth of the power of the crowd" as before that point "most popular uprisings had been ineffectual in transforming society").

[169] *Id.* at 28–30.

[170] GUSTAVE LE BON, THE CROWD: A STUDY OF THE POPULAR MIND 52–53 (2d ed. 1968); *see also* STUART EWEN, PR!: A SOCIAL HISTORY OF SPIN 64–66 (1996) (explaining Le Bon's influence on future social theorists and publicists); LARRY TYE, THE FATHER OF SPIN: EDWARD BERNAYS & THE BIRTH OF PUBLIC RELATIONS 94 (1998) ("Le Bon raised the specter of a frightening new era dominated by the masses, by a crowd unbound by the rules of reason that governed the middle class.").

[171] LE BON, *supra* note 170, at xxi–xxii.

sociologist Max Weber identified charisma, a quality often ascribed to celebrities,[172] as a common mechanism for leadership.[173] For Weber, charisma was a non-economic type of social control, one that was in fundamental tension with economic interests.[174] A few years later, theorists of the Frankfurt School contended that the public irrationally placed their trust in celebrities, thereby unknowingly disenfranchising themselves. Specifically addressing the question of modern fame, Theodor Adorno and Max Horkheimer located celebrity within "the culture industry."[175] According to them, consumers of celebrity culture unwittingly had a capitalist power structure imprinted on their minds that they blindly followed.[176]

What united these thinkers was a belief that celebrity was an irrational and potentially harmful phenomenon. Weber described charismatic leadership, in its purest form, as "a turbulently emotional life that knows no economic rationality . . . ."[177] For Adorno and Horkheimer, rather than acting in rational self-interest, the public consumed celebrity in an irrational and destructive way.[178] These concerns were mirrored in discussions of fandom provided by early and mid-twentieth-century

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[172] *See* GAMSON, *supra* note 75, at 8 (stating that charisma is one of the qualities that was necessary to help certain people to become stars and rise to fame); Jessica Evans, *Celebrity, Media, and History*, *in* UNDERSTANDING MEDIA: INSIDE CELEBRITY 11, 17 (Jessica Evans & David Hesmondhalgh eds., 2005) ("What is a celebrity? Celebrities are, of course, *meant* to be remarkable people, who have charismatic appeal and extraordinary qualities . . . ."); *see also* Ronald E. Riggio, *Charisma: What Is It? Do You Have It?*, PSYCH. TODAY (Feb. 15, 2010), *available at* http://www.psychologytoday.com/blog/cutting-edge-leadership/201002/charisma-what-is-it-do-you-have-it (listing celebrities and other well-known popular figures as examples of charismatic people).

[173] *See* Nick Stevenson, *Audiences and Celebrity*, *in* UNDERSTANDING MEDIA: INSIDE CELEBRITY *supra* note 172, at 138 ("One way of understanding celebrities . . . is that they are charismatic individuals. . . . Weber argued that charisma represents a specific form of domination in the modern era."). Film historian Richard Dyer explored the nature of charisma for celebrities, explaining that the term, as a definition presented by Weber, points to "a certain quality of an individual personality by virtue of which he is [sic] set apart from ordinary men and treated as endowed with supernatural, superhuman or least superficially exceptional qualities." Richard Dyer, *Charisma*, *in* STARDOM: INDUSTRY OF DESIRE 57, 57 (Christine Gledhill ed., 1991); *see also* MARSHALL, *supra* note 155, at 20–22 (explaining how Weber's conceptual development of the word charisma has significantly contributed to the study of leadership).

[174] 2 Max WEBER, ECONOMY AND SOCIETY 1120 (Guenther Roth & Claus Wittich eds., 1978); *see also* Louis Schneider, *Max Weber: Wisdom and Science in Sociology*, 12 SOC. Q. 462, 463 (1971).

[175] Max Horkheimer & Theodor W. Adorno, *The Culture Industry: Enlightenment as Mass Deception*, *in* MEDIA AND CULTURAL STUDIES: KEYWORKS 71, 100 (Meenakshi Gigi Durham & Douglas M. Kellner eds., 2002); *see also* MARIA STURKEN & LISA CARTWRIGHT, PRACTICES OF LOOKING: AN INTRODUCTION TO VISUAL CULTURE 164–68 (2001) (describing the influence of the Frankfurt School theorists' critique of mass media).

[176] *See* Horkheimer & Adorno, *supra* note 175, at 79 ("Capitalist production so confines them, body and soul, that they fall helpless victims to what is offered them.").

[177] 2 WEBER, *supra* note 174, at 1120.

[178] Horkheimer & Adorno, *supra* note 175, at 44–45; *see also* THE FRANKFURT INSTITUTE FOR SOCIAL RESEARCH, ASPECTS OF SOCIOLOGY 94–95 (John Viertel trans., Beacon Press 1972) (1956) (discussing how people have become functionaries of celebrity culture).

psychologists and journalists. Harvard psychologist Hugo Munsterberg explained how celluloid stars, aided by the techniques of moviemaking, triggered powerful emotional responses in audiences.[179] Hollywood columnist Louella Parsons decried the "mob violence that seems to be spreading across our nation wherever stars appear."[180] *The New Yorker* labeled the scene of thousands of fans trying to get into a 1944 Frank Sinatra concert as "a terrifying phenomenon of mass hysteria that is seen only two or three times in a century."[181] This fear of celebrity audiences was not confined to the elite. As historian Samantha Barbas writes, even as box office revenues surged, many Americans of the time became convinced of the pathology of the average film enthusiast.[182]

These concerns over the irrational nature of celebrity translated into a distrust of celebrity publicity. Inherent in the nature of celebrity is management of the images transmitted to the public. At this point, rather than being a respected profession, the public relations industry was disparaged and its practitioners lacked professional status. Publicity techniques of the time, like writing up stories in column format that could easily be pasted into newspapers and sent unsolicited to editors, required little specialized knowledge or training.[183] After World War II, publicists were increasingly tasked with enhancing the reputation of individuals, particularly politicians. But these efforts to manipulate the forces of reputation and celebrity were largely ad hoc.[184] There was little suggestion that a blueprint had been found for manufacturing fame. Instead, publicists

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[179] SAMANTHA BARBAS, MOVIE CRAZY: FANS, STARS, AND THE CULT OF CELEBRITY 165 (2001).

[180] Louella Parsons, *They're Human, Too*, PHOTOPLAY, Aug. 1946, at 33.

[181] E.J. Kahn, *The Slaves of Sinatra*, NEW YORKER, Nov. 1946.

[182] *See* BARBAS, *supra* note 179, at 181. Fame not only had a destabilizing impact on social relations, but it also had the potential to disrupt the psychological well-being of the newly famous. In an influential essay published in 1947, Tennessee Williams crystallized the popular view of fame's impact on the individual. Tennessee Williams, *On a Streetcar Named Success*, N.Y. TIMES, Nov. 30, 1947, at X1. Williams described his own "spiritual dislocation" upon the widespread success of his play *The Glass Menagerie*. *Id.* Quoting from William James, he referred to the success enjoyed by celebrities as a "Bitch Goddess" that results in alienation and distrust. *Id.* Striving and hard work need to be part of an artist's existence, yet the life of a celebrity does not even require a certain minimal effort as the individual no longer has to perform a single menial task. *Id.* Williams' take on celebrity was often repeated in popular entertainment and social commentary: for example, films like *A Face in the Crowd* and *A Star is Born* depicted celebrities as people from common origins who are corrupted by fame. MARSHALL, *supra* note 155, at 90–91. Christopher Lasch's 1979 book *The Culture of Narcissism* blamed everything from the Vietnam War to a decline in "team spirit" on the psychological pathologies of being a celebrity. CHRISTOPHER LASCH, THE CULTURE OF NARCISSISM 116–19, 209–11 (1979).

[183] *See* TYE, *supra* note 170, at 157. The most famous celebrity publicists of the day, Harry Reichenbach and Jim Moran, were known for outrageous stunts that captured media attention yet bespoke a lack of professionalism. Denise E. DeLorme & Fred Fedler, *Early Journalists and the Evolution of Publicists' Stunts: From Circus Ballyhoo to Professionalism*, 2 J. INTERDISC. & MULTIDISCIPLINARY RES. 1, 5–6 (2008).

[184] TYE, *supra* note 170, at 81.

were viewed as "flim flam" men.[185] Even if their techniques sometimes worked, they were looked down upon.[186] Originally used to refer to carnival barkers, the term "ballyhoo" became synonymous with early twentieth-century publicists and press agents, suggesting an unsavory character to their brand of visibility building.[187]

Legal opinion regarding public relations matched the general skepticism of the times. Supreme Court Justice Felix Frankfurter described public relations experts as "professional poisoners of the public mind" who exploit "foolishness and fanaticism and self-interest."[188] Judge Learned Hand bemoaned modern American society's reliance on media specialists describing "publicity [as] an evil substitute" for "first-hand knowledge."[189] Other judicial opinions suggested a lack of respect for the practitioners of "ballyhoo."[190] Legal commentators feared what they viewed as a new era of focus on image and surface, describing "the domination of the electoral process by professional public-relations firms"[191] and placing quotation marks around the term "professional" when describing public relations analysts.[192] Unlike other elites that judges and legal academics could identify with, publicists seemed to rely on

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[185] *See, e.g.*, Stanley Walker, *Playing the Deep Bassoons*, HARPERS MAG., Feb. 1932, at 373; TYE, *supra* note 170, at 63 (stating that despite triumphs, publicists' roles were still cast in a "dimmer light" causing people to raise doubts about the profession).

[186] *See* TURNER, *supra* note 112, at 43 (describing the popular view of press agents as "an unsavory and forlorn group of men"). *But see* NEAL GABLER, WINCHELL: GOSSIP, POWER AND THE CULTURE OF CELEBRITY 249 (1995) (stating that, despite press agents being widely despised, they were "the ants that moved the mountain" because without them, there would be no mass culture).

[187] *See, e.g.*, SAMANTHA BARBAS, THE FIRST LADY OF HOLLYWOOD: A BIOGRAPHY OF LOUELLA PARSONS 194 (2005) (describing articles in the popular press that "attacked the studios for misleading audiences with publicity 'ballyhoo'"); John Lentz, *Publicity—How to Plan, Produce, and Place It*, 33 AM. J. PUBLIC HEALTH 449, 449 (1943) (book review) (stating that publicity is synonymous with ballyhoo). One example important to the public mind at the time was the outrageous publicization of screen idol Rudolph Valentino's funeral. *See* REIN ET AL., *supra* note 122, at 284. Publicist Harry C. Klemfuss organized a "dramatic and [slightly] macabre staging" of Valentino's interment complete with blackshirted honor guard and actors hired to look like genuine mourners that screamed bad taste yet drew enormous crowds. *Id.* at 284; JERRE MANGIONE & BEN MORREALE, LA STORIA: FIVE CENTURIES OF THE ITALIAN AMERICAN EXPERIENCE 387 (1993). The publicity worked too well in some eyes as onlookers rioted at the funeral home, smashing windows and injuring several. FREDERICK LEWIS ALLEN, ONLY YESTERDAY: AN INFORMAL HISTORY OF THE 1920S 212 (1931); *see also* M.M. Marberry, *The Overloved One*, 16 AM. HERITAGE MAG. 84 (1965), *available at* http://www.americanheritage.com/content/%E2%80%9C-overloved-one%E2%80%9D (describing the publicity surrounding Valentino's funeral and the public's immense interest in it).

[188] TYE, *supra* note 170, at 63 (quoting letter from Justice Felix Frankfurter to President Franklin D. Roosevelt (May 7, 1934)).

[189] Proceedings in Memory of Justice Brandeis, 317 U.S. ix, xiv-xv (1942).

[190] *E.g.*, Greenberg v. Lorenz, 178 N.Y.S.2d 407, 409 (App. Term 1958).

[191] Murray L. Schwartz, *Packer: The Limits of the Criminal Sanction*, 21 STAN. L. REV. 1277, 1291 (1968) (book review).

[192] H.H. Wilson, Book Note, 64 YALE L.J. 617, 619 (1955) (reviewing ROBERT E. LANE, THE REGULATION OF BUSINESSMEN: SOCIAL CONDITIONS OF GOVERNMENT ECONOMIC CONTROL (1954)).

obfuscation and lacked a method of licensure or ethical code to regulate their profession.[193]

B. *Public Relations Rationalizes Fame*

Later in the twentieth century, however, the public relations industry evolved in ways that conferred legitimacy on its practices. By introducing supposedly scientific methods for measuring popularity, the profession helped ease fears over the unpredictable nature of fame.[194] As businesses came to believe that the selling power of celebrity could be managed and controlled, they invested more resources in celebrity advertising and merchandise. By the 1980s and 1990s, earlier hostility to the psychological underpinnings of celebrity was replaced with a newfound respect for efforts to achieve public recognition. Through a concerted effort to demonstrate its ability to systematize the creation of celebrity, the public relations profession helped assuage longstanding fears over fame's mercurial nature. In this way, the technological changes described in Part II were an important precondition to the expansion of celebrity rights, but the efforts of publicity practitioners seizing on those changes were also critical to the growth of the right of publicity.[195]

Public relations, particularly with regard to celebrities, only achieved legitimacy in the last decades of the twentieth century when publicists unveiled two new strategies for crafting public opinion.[196] The first, segmenting, successfully diffused celebrity power to make it seem less threatening while at the same time providing publicists with a skill they could claim as their own. Originally, what made the crowd theorists so threatened by celebrity was its link to the undifferentiated mob.[197] Early use of celebrities in endorsement deals did nothing to assuage this threat as

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[193] Fledgling efforts were made to mark public relations as a respectable profession with its own methodology and code of ethics in the 1940s, but they failed to achieve widespread support. *See* RICHARD S. TEDLOW, KEEPING THE CORPORATE IMAGE: PUBLIC RELATIONS AND BUSINESS, 1900-1950 39–40 (1979). A formal professional organization, the Public Relations Society of America (PRSA) was formed in 1948 and developed an industry code of ethics six years later. MARVIN N. OLASKY, CORPORATE PUBLIC RELATIONS: A NEW HISTORICAL PERSPECTIVE 127 (1987). The success of the PRSA's code is debatable, however, as ethical concerns were not even discussed in any of the public relations textbooks of the time. *See* T.H. Bivins, *Are Public Relations Texts Covering Ethics Adequately?*, 4 J. MASS MEDIA, 39, 41–43 (1989) (discussing how little text space is devoted to ethics in public relations textbooks).

[194] *See, e.g.*, REIN ET AL., *supra* note 122, at 104–05 (discussing how ratings under the Q Score system were developed to quantify celebrities' drawing power).

[195] *See* Balkin & Siegel, *supra* note 13, at 929 (describing how legally significant social movements often take advantage of technological changes to justify new legal claims).

[196] *See* DAVID MILLER & WILLIAM DINAN, A CENTURY OF SPIN: HOW PUBLIC RELATIONS BECAME THE CUTTING EDGE OF CORPORATE POWER 4 (2008) (contending that public relations only began to become systematized in the later twentieth century as its general use in the business world greatly expanded).

[197] *See* MARSHALL, *supra* note 155, at 27–28.

such deals featured stars that could captivate the entire public. This fit with a general strategy in early twentieth century advertising to appeal to the public on the broadest terms possible.[198] The biographer of publicist Edward Bernays wrote that Bernays "was wary of the common man, especially when he got together with other common men."[199] Nevertheless, Bernays' campaigns were typically designed for mass appeal, not narrow demographics.[200]

Beginning after World War II, however, public relations professionals identified particular demographic groupings that their celebrities could appeal to.[201] In part, this stemmed from broader changes taking place in American society. Marketers took note as groups organized by race, ethnicity, and gender banded together to fight for political and civil rights.[202] Technological advances generated fine-grained data on consumer preferences while allowing for more targeted commercial solicitations.[203] Meanwhile, in the 1980s and 1990s, the number of communications channels available for consumption multiplied greatly, which permitted the development of celebrities designed to appeal to narrower and narrower demographic slices.[204] As a result, rather than discovering talent, the primary role of the celebrity public relations specialist in the second half of the twentieth century was to discover a market and then insert the appropriate celebrity into that market.[205] For example, by the 1980s, efforts at celebrity creation in the music industry revolved around identifying a particular market segment and stylistically differentiating the artist-client to appeal to that segment.[206] Advertisers now sought celebrities that could project images suitable for the interests and lifestyle

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[198] *See* JOSEPH TUROW, NICHE ENVY: MARKETING DISCRIMINATION IN THE DIGITAL AGE 30–31 (2006); Mark Bartholomew, *Advertising and Social Identity*, 58 BUFF. L. REV. 931, 945–46 (2010).

[199] TYE, *supra* note 170, at 97.

[200] *Id.*

[201] GAMSON, *supra* note 75, at 13 (stating that marketing became more scientific with the trend of targeting specific market niches in product development and sales).

[202] ALEXANDRA CHASIN, SELLING OUT: THE GAY AND LESBIAN MOVEMENT GOES TO MARKET, at xv (2000); *see also* LIZABETH COHEN, A CONSUMERS' REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POSTWAR AMERICA 161, 309–10 (2003) (tracing the rise of use of "market segmentation" by retailers to the 1960s and 1970s).

[203] *See* TUROW, *supra* note 198, at 2; *see also* CHRIS ANDERSON, THE LONG TAIL: WHY THE NATURE OF BUSINESS IS SELLING LESS OF MORE 5–6 (2006) (discussing how the Internet has caused the cost of reaching niche consumers to fall); SUZANNA DANUTA WALTERS, ALL THE RAGE: THE STORY OF GAY VISIBILITY IN AMERICA 236–37 (2001) ("[N]iche marketing has itself become the preeminent strategy of both corporations and the media.").

[204] *See* MARSHALL, *supra* note 155, at 186 (discussing differentiated production of celebrities within particular aspects of the entertainment industry).

[205] *See* GAMSON, *supra* note 75, at 15 ("[A] shrewd agent was shown discovering a market and manufacturing a celebrity-product around it.").

[206] MARSHALL, *supra* note 155, at 161.

of a specific social niche.[207] Marketers began to see the untapped economic potential of using particular celebrities to appeal to racial minority groups.[208] This specialization process not only made the publicity agents' expertise appear more necessary and more systematic, but it also helped ameliorate concerns with the unpredictability of figures that drew their support from the general population. A celebrity who appealed to a narrow demographic was less threatening than one who captivated the entire country.

Another critical innovation in celebrity public relations was the quantification of fame. Just as early advertisers attempted to gain professional status by linking marketing methods to scientific principles, publicists developed ratings systems to quantify the selling power of celebrities.[209] The first of these systems focused on particular attributes thought to be relevant to consumer response to endorsements. In 1953, psychologist Carl Hovland introduced a model for evaluating the effectiveness of a persuasive message known as the Source Credibility Model.[210] Although originally developed for the study of communication, advertisers used Hovland's model to measure the effectiveness of celebrity endorsements.[211] Other research demonstrated that consumers form positive stereotypes about attractive people so additional models were constructed to assess endorser attractiveness.[212] Advertisers became increasingly eager to select particularly good-looking media personalities for their commercials.[213] These new techniques offered "proof" as to which personalities would have commercial appeal.

In addition to introducing systematized predictions of credibility and attractiveness, publicists began to offer advertisers more refined data on celebrity popularity. Beginning in the 1960s, a United States firm known as Marketing Evaluations began sending out questionnaires to the public to

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[207] *See* Alan R. Miciak & William L. Shanklin, *Choosing Celebrity Endorsers*, 3 MKTG. MGMT. 51, 55 (1994) ("Celebrities who are deemed to be desirable by agencies and clients project images that coalesce with the interests, experiences, and lifestyles of the target market.").

[208] CASHMORE, *supra* note 4, at 118–19.

[209] *See* REIN ET AL., *supra* note 122, at 119.

[210] *See* CARL I. HOVLAND ET AL., COMMUNICATION AND PERSUASION: PSYCHOLOGICAL STUDIES OF OPINION CHANGE 21, 38–39 (1953) (investigating the effect that credibility of a source has on marketing success); *see also* B. Zafer Erdogan, *Celebrity Endorsement: A Literature Review*, 15 J. MKTG. MGMT. 291, 297 (1999) (stating that the Source Credibility Model reflects the theory that "various characteristics of a perceived communication source may have a beneficial effect on message receptivity").

[211] *See* Erdogan, *supra* note 210, at 297 (discussing the findings of Hovland's study as indication that the "effectiveness of a message depends on [the] perceived level of expertise and trustworthiness of an endorser").

[212] *See* Lynn R. Kahle & Pamela M. Homer, *Physical Attractiveness of the Celebrity Endorser: A Social Adaptation Perspective*, 11 J. CONSUMER RES. 954–55 (1985) (concluding that studies show a positive correlation between the attractiveness of an informational source and attitudinal change).

[213] Erdogan, *supra* note 210, at 299.

sample their knowledge and favorability rating for various well-known figures.[214] Marketing Evaluations used these survey responses to calculate a number, known as a "Q score," that represents an individual celebrity's relative popularity, and hence, potential as a corporate spokesperson. The figure's Q score is "calculated by dividing the percentage of the total survey sample rating the celebrity as 'one of their favourites'" by the percentage of the sample who acknowledge knowing the celebrity.[215] Marketing Evaluations also provides advertisers with "Dead Qs"—ratings of the current popularity of dead celebrities.[216] These ratings tend to show that celebrity likeability increases after death, making some dead celebrities even more marketable than their living counterparts.[217]

Over time, Q ratings achieved greater and greater legitimacy. The media and the general public came to rely on them to describe events in the entertainment industry. Press accounts frequently cite the rise or fall of a celebrity's Q-score as concrete evidence of changes in public approval.[218] For example, a 1987 profile of the actress Cher explained "[t]here is no clear evidence that Cher has pull" given her low Q ratings.[219] On the other hand, Whoopi Goldberg's ability to land starring roles in films during the late 1980s and early 1990s was attributed to her high Q ratings.[220] In 1993, famed *60 Minutes* producer Don Hewitt complained about television journalism's increasing reliance on such statistics.[221] Today, celebrity gossip columnists use the ratings to explain why it no longer makes sense for Hollywood directors to cast troubled starlet Lindsay Lohan[222] and how

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[214] *Id.* at 302; *see also* PETER B. ORLIK, CAREER PERSPECTIVES IN ELECTRONIC MEDIA 23 (2004) ("[T]he Q ratings annually survey some ten thousand households as to their attitudes towards approximately fifteen hundred performers and celebrities in twenty-one categories.").

[215] Erdogan, *supra* note 210, at 302.

[216] *Q score: Definition*, WORD IQ, http://www.wordiq.com/definition/Q_score (last visited Sept. 16, 2011).

[217] *See* Aaron Baar, *Q Score: Celebs Worth More Dead Than Alive*, MEDIAPOST (July 9, 2009, 3:44 PM), http://mediapost.com/publications/index.cfm?fa=Articles.showArticle&art_aid=109467 (predicting an increase in Michael Jackson's likability following his death based on the increased popularity of both Johnny Cash and Elvis Presley in the aftermath of their deaths).

[218] *E.g.*, Beth Landman Keil & Deborah Mitchell, *Is Ellen Out of Favor?*, N.Y. MAG., Sept. 22, 1997, at 11 (evaluating Ellen DeGeneres's negative Q rating); Eric Wilson, *Who's That Girl?*, N.Y. TIMES, July 17, 2008, at G1 (discussing Madonna's declining Q score); Catharine P. Taylor, *Leno's Q Score Takes It on Chin, But How Bad Is the Injury?*, BNET (Mar 18, 2010), http://www.bnet.com/blog/new-media/lenos-q-score-takes-it-on-chin-but-how-bad-is-the-injury/5028?tag=mantle_skin;content (discussing the decline in Jay Leno's Q score in just a few months).

[219] Bruce Weber, *Cher's Next Act*, N.Y. TIMES, Oct. 18, 1987, at 42.

[220] Steve Bornfeld, *WHO'S Q*, ALBANY TIMES UNION, Apr. 19, 1992, at G1.

[221] Nicholas Fraser, *Media: Greying Eminence*, GUARDIAN, Nov. 15, 1993, at 16.

[222] *E.g.*, Nicole Eggenberger, *Why Is Lindsay Lohan a Bad Business Investment?*, OK! MAG. (Apr. 26, 2010, 3:35 PM), http://www.okmagazine.com/2010/04/why-is-lindsay-lohan-a-bad-business-investment/ ("[F]or every nine people who will see a Lindsay movie, 52 out of 100 will not.").

Britney Spears' bizarre behavior "may be eroding her own brand."[223] When evidence of Tiger Woods' infidelity came to light, media outlets quickly cited his declining Q-score as proof of his fall from grace.[224] There appears to be little concern with the difficulty in measuring something as irrational as public attraction to a celebrity. As one popular celebrity gossip blogger recently opined, "[l]ikability may seem difficult to quantify, but it's actually pretty simple."[225]

Perhaps most telling, in a commercial landscape where one-quarter of all advertisements rely on celebrity endorsers,[226] the Q-score system has become the "industry standard in advertising."[227] In 1989, network executives engaged in a bidding war to lure news anchor Connie Chung because of her high Q rating.[228] When Mickey Mantle died in 1995, media watchers speculated as to what his Q-score would mean for his postmortem marketability.[229] Business school textbooks describe the Q rating system as a valuable marketing tool.[230] In recent years, other firms have followed Marketing Evaluations' lead, introducing their own celebrity rating systems with subtle tweaks on the Q score model.[231]

These techniques—segmenting and quantification—increased the

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[223] Jeremy Herron, *An Economy Grows Around Britney Spears*, HUFFINGTON POST (Jan. 28, 2008, 9:41 PM), http://www.huffingtonpost.com/2008/01/28/an-economy-grows-around-b_n_83673.html.

[224] *E.g.*, Michael O'Keeffe, *Q School to Target Tiger, Ad Image in Question*, N.Y. DAILY NEWS, Dec. 4, 2009, at 72 (noting the expected decrease in Woods' Q Score in the wake of his scandal).

[225] Jo Piazza, *Hollywood Investments: Why Lindsay Lohan Is So Unbankable*, POPEATER (Apr. 26, 2010, 12:52 PM), http://www.popeater.com/2010/04/26/lindsay-lohan-box-office.

[226] Erdogan, *supra* note 210, at 292.

[227] Kevin E. Kahle & Lynn R. Kahle, *Sports Celebrities' Image: A Critical Evaluation of the Utility of Q Scores*, *in* CREATING IMAGES AND THE PSYCHOLOGY OF MARKETING COMMUNICATION 191, 192 (Lynn R. Kahle & Chung-Hyŏn Kim eds., 2006); *see also* BERNARD J. MULLIN ET AL., SPORT MARKETING 154 (3d ed. 2007) ("'[H]undreds of millions of advertising decisions are predicated' on the annual Q-Score . . . ."); Miciak & Shanklin, *supra* note 207, at 53 ("Advertisers often consult the Performer Q score to estimate a celebrity's endorsement potential."); John Marchese, *There's Gold in This Old Tool Belt*, N.Y. TIMES, Sept. 11, 1997, at C1 ("A 'Q score' is a quotient of on-screen likability that advertisers crave.").

[228] Bill Carter, *Television: One Queen, Two Thrones: The Fight for Connie Chung*, N.Y. TIMES, Mar. 20, 1989, at D1.

[229] Richard Sandomir, *Amid Memories and Profit, Mantle's Legend Lives On*, N.Y. TIMES, Aug. 22, 1996, at A1.

[230] *See* ORLIK, *supra* note 214, at 23, 25 ("The Q ratings do constitute an important tool by which advertising agencies can zero in on spokespersons who appear to test well on name recognition and familiarity with the demographic group(s) that clients are attempting to reach."); JOHN R. ROSSITER & LARY PERCY, ADVERTISING AND PROMOTION MANAGEMENT 293–94 (1987) (describing the VisCAP model, which is functionally analogous to the Q-Score, as an important marking tool for choosing a celebrity endorser); TERENCE A. SHIMP, ADVERTISING, PROMOTION, AND SUPPLEMENTAL ASPECTS OF INTEGRATED MARKETING COMMUNICATIONS (4th ed. 1997) ("Performer Q-Ratings provide valuable information to brand managers and advertising agencies . . . .").

[231] *See* DUANE E. KNAPP, THE BRAND PROMISE 188–91 (2008) (describing the Davie-Brown index (DBI), developed by Davie-Brown Entertainment and based on the individual attributes of celebrities and a combination of other variables).

power of celebrities and the publicists who shepherded them through the media. By purporting to know just how to target and quantify a celebrity's popularity, publicists laid claim to specialized skills that others wanted in an era of increasing celebrity value. Originally considered socially inferior to journalists,[232] publicists began to become bigger and bigger participants in the news cycle. Journalists in the 1980s and 1990s became dependent on publicists for content, ceding status and power to them in return for compelling narratives.[233] By one account, seventy percent of all information published as "news" in the 1990s was provided by a public relations agent.[234] At the same time, public relations management expanded into new fields besides entertainment, giving it further social legitimacy.[235] For businesses, it became more and more acceptable to transparently acknowledge their efforts at image creation and branding.[236] Publicists also found new professional power through sheer numbers. By the 1980s, there were 100,000 public relations professionals practicing in the United States.[237] Certain celebrity agents, like Michael Ovitz and Scott Boras, rose to the status of celebrities themselves.[238]

The legal importance of these changes in how celebrity publicity is presented and perceived should not be underestimated. The move to quantify fame assuaged particular legal concerns over the amorphous nature of celebrity. Rights that are deemed to be vague are not treated as fully alienable and inheritable under the law.[239] Although a right of publicity has existed since 1953, a typical objection to a descendible right of publicity was that the interests at stake were so unspecific that they should not be deemed "property."[240] But once the value of celebrity appeared susceptible to rigorous measurement, these concerns dissipated. Measures to quantify celebrity marketability became accepted as valuable

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[232] *See* REIN ET AL., *supra* note 122, at 284 ("Many publicists were ex-newspaper writers. . . . News reporters have long disdained turncoats who found it expedient to sell their souls to the devil and flood their former newsrooms with promotional material.").

[233] *See* GAMSON, *supra* note 75, at 42 (noting that news has become more dependent on public relations practitioners); *see also* Frances Bonner, *The Celebrity in the Text*, *in* UNDERSTANDING MEDIA: INSIDE CELEBRITY, *supra* note 173, at 57, 92 (noting the increased presence of celebrities in the news); Roberta Rosenthal Kwall, *Fame*, 73 IND. L.J. 1, 28 (1997) (explaining how the news has become more dependent on celebrity).

[234] REIN ET AL., *supra* note 122, at 286.

[235] *Id.* at 272, 285.

[236] *See* DANIEL J. BOORSTIN, THE IMAGE: A GUIDE TO PSEUDO-EVENTS IN AMERICA 183–94 (Vintage Books 1992) (1961).

[237] GAMSON, *supra* note 75, at 42; *see also* TYE, *supra* note 170, at x (noting that there were 125,000 public relations practitioners by the end of the twentieth century).

[238] *See* TURNER, *supra* note 112, at 44; Jack Curry, *Ultimate Salesman, Pitching the Biggest Stars in Baseball*, N.Y. TIMES, Dec. 13, 2004, at D1.

[239] Terrell & Smith, *supra* note 92, at 6.

[240] *Id.*

evidence in legal proceedings.[241] Courts now admit expert witness testimony to place a dollar figure on celebrity.[242] In the civil trial of O.J. Simpson, the head of a celebrity licensing agency valued Simpson's publicity rights at twenty-five million dollars.[243] Valuation of celebrity seems to give modern courts little pause.[244] The perceived increase in celebrity status during a marriage now qualifies, at least in some states, as marital property subject to equitable distribution on divorce.[245] Even "Dead Q" scores are touted as admissible evidence that can be used by celebrity estates in infringement lawsuits.[246] The quantification of celebrity's value made the case for property rights in celebrity personas more compelling. By crystallizing a star's endorsement value, marketers offered real evidence to lawmakers of the value in celebrity rights.

Courts also began to analogize celebrities with trademarks during this period. One aim of trademark law is to stabilize meanings, and thereby reduce the search costs of consumers.[247] Bankable stars, rather than representing unpredictable forces that can endanger careful economic planning, have come to serve as symbols that reify corporate identities and

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[241] *E.g.*, Ryther v. KARE 11, 864 F. Supp. 1510, 1515 (D. Minn. 1994), *aff'd*, 108 F.3d 832 (8th Cir.) ("The Q score is widely used in the media industry to show viewer attachment to a personality by measuring the percentage of viewers who recognize the person and the percentage of viewers who are strongly favorable or strongly unfavorable of that person. The information obtained from open-ended questions provides a more complete picture of what viewers think about key personalities."); *see also Valuations*, RIGHT OF PUBLICITY, http://rightofpublicity.com/valuations (last visited Sept. 12, 2011) ("The most critical component to Right of Publicity licensing or litigation disputes is that of valuations.").

[242] *See* Jonathan Faber, *Protecting, Valuing and Licensing the Famous*, IND. LAW., Mar. 24–Apr. 6, 2004, at 1 ("Expert witnesses for valuation purposes often perform an integral role in providing an objective, substantiated market value assessment or damages evaluation."); *see also, e.g.*, Callaway Golf Co. v. Screen Actors Guild, Inc., No. 07CV0373-LAB, 2009 WL 5125603, at *1, *3 (S.D. Cal. Dec. 18, 2009) (denying motion to exclude expert witness testimony regarding "the value of television advertising and other services performed by athletes"); Doe v. McFarlane, 207 S.W.3d 52, 68, 70 (Mo. Ct. App. 2006) (allowing expert testimony regarding endorsement value of name of former NHL hockey player).

[243] Rufo v. Simpson, 86 Cal. App. 4th 573, 617–18 (2001); B. Drummond Ayres Jr., *Set Damages That Hurt Simpson, Jury Is Urged*, N.Y. TIMES, Feb. 7, 1997, at A20.

[244] *See* Westfall & Landau, *supra* note 10, at 104 (maintaining that "a thriving market exists for publicity rights" that makes their value easily estimated).

[245] *See* Piscopo v. Piscopo, 557 A.2d 1040, 1042 (N.J. Super. Ct. App. Div. 1989) (finding that the plaintiff's celebrity goodwill achieved during the marriage could be included in the marital estate); Westfall & Landau, *supra* note 10, at 99–110 (describing the current state of the law regarding the treatment of celebrity goodwill upon divorce).

[246] Anna Heinemann, *Lucille Ball Is the Best Dead Celeb for Your Ad Campaign*, ADVER. AGE (July 18, 2005), http://adage.com/article/mediaworks/lucille-ball-dead-celeb-ad-campaign/46265/.

[247] Mushroom Makers, Inc. v. R.G. Barry Corp., 580 F.2d 44, 47 (2d Cir. 1978) (citing Polaroid Corp. v. Polarad Elecs. Corp., 287 F.2d 492, 495 (2d Cir. 1961)); Justin Hughes, *Champagne, Feta, and Bourbon: The Spirited Debate About Geographical Indications*, 58 HASTINGS L.J. 299, 336–37 (2006).

take the risk out of media production.[248] One powerful example of how judges accepted the newfound economic potential of celebrity was their choice to describe celebrities as "brands" or "trademarks," invoking the same terms used by celebrity publicists and marketers.[249] Hence in a 1992 case featuring singer Tom Waits, the court explained that false endorsement law extends to celebrities who have "an economic interest akin to that of a trademark holder in controlling the commercial exploitation of his or her identity."[250] In another case, the court noted that "courts routinely recognize a property right in celebrity identity akin to that of a trademark holder."[251] The Ninth Circuit adapted its traditional test for trademark infringement to accommodate celebrity false endorsement claims, explaining that, for celebrity cases, "the term 'mark' applies to the celebrity's persona, the 'strength' of the mark refers to the level of recognition that the celebrity has among the segment of the public to whom the advertisement is directed, and the term 'goods' concerns the reasons for or source of the celebrity's fame."[252] These cases explain that the right of celebrities to control use of their names and likenesses parallels the privileges held by trademark owners.[253] By borrowing from the terminology of trademark law, judges signal their acceptance of celebrity as a stabilizing and predictable force.[254]

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[248] David Hesmondhalgh, *Producing Celebrity*, *in* UNDERSTANDING MEDIA: INSIDE CELEBRITY, *supra* note 173, at 98, 116; *see also* MARSHALL, *supra* note 156, at 245 (stating that celebrities are meant to serve as imperfect economic stabilizing devices like brand names). Like their judicial counterparts, today's legal academics often cede the rationality of celebrity value. Roberta Kwall accepts the influence of celebrity on buying decisions, noting that "celebrity endorsements function in much the same way as trademarks do—to communicate information about the product." Kwall, *supra* note 233, at 25. Stacey Dogan and Mark Lemley, although arguing for imposing strict limits on the right of publicity akin to trademark law, maintain that celebrity endorsements play such a significant role in today's consumer society that consumers' psychological predisposition towards celebrity should be legally preserved. Dogan & Lemley, *supra* note 2, at 1164 n.10 ("In a market economy, the right of publicity quite reasonably takes this consumer preference as a given and tries to make sure that even if consumers are irrational in preferring celebrity-endorsed products, they are at least not deceived as to the endorsement of those products."). Sheldon Halpern contends that "the kinship between the federal trademark construct and [the right of publicity] is evident" and that the value in celebrity "is simply a matter of market place reality." Sheldon Halpern, *Trafficking in Trademarks: Setting Boundaries for the Uneasy Relationship Between "Property Rights" and Trademark and Publicity Rights*, 58 DEPAUL L. REV. 1013, 1033, 1035 (2009). Although often hostile to some aspects of the right of publicity, legal scholars have accepted celebrity's recent repackaging as a quantifiable and predictable component of business.

[249] In recent years, a host of decisions have recognized celebrity claims for false endorsement under the Lanham Act, the federal statute governing trademark law. Beser, *supra* note 89, at 1804.

[250] Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1110 (9th Cir. 1992).

[251] Parks v. LaFace Records, 329 F.3d 437, 447 (6th Cir. 2003).

[252] Downing v. Abercrombie & Fitch, 265 F.3d 994, 1000, 1007 (9th Cir. 2001).

[253] *See* David S. Welkowitz, *Famous Marks Under the TDRA*, 99 TRADEMARK REP. 983, 983 (2009) (noting increasing use of "celebrity trademarks" in the late twentieth century).

[254] One response to the analogy drawn between celebrity rights and trademark rights would be to question the necessity of the right of publicity at all given the presence of a trademark regime that

Celebrity's rationalization coincided with deeper affinities between celebrities and legal and political elites.[255] Judges are now more accepting of the role of publicists, even protecting celebrity communications with public relations firms under the attorney-client privilege.[256] Recognizing that the requirements for celebrity have dropped and that segmenting allows for stardom in narrow fields, lawyers have set out to find their own fame. Publishers print legal "halls of fame," marking lawyers and judges with the badge of celebrity.[257] Lawyers have their own gossip blogs to keep up on the comings and goings of the legally well-known.[258] Several television shows specialize in chronicling the legal troubles of celebrities, and heavily feature their legal counsel.[259] News channels devote hours to legal questions and catapult lawyers-cum-news anchors to celebrity status.[260] "[T]he best-known lawyers among us are show business icons, luminaries in the culture of celebrity."[261] Meanwhile, judges show an increased willingness to invoke the lessons of popular culture in real-life legal decisions.[262]

In addition, celebrity influence on political elites has also increased. Celebrity involvement with politics is nothing new, but Linda Demaine has

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protected celebrity personas. Although it does not appear that any court or legislature has acknowledged this argument, it has attracted academic attention. *See* Dogan & Lemley, *supra* note 2, at 1166. *But see* 1 MCCARTHY, *supra* note 22, § 2:8 (criticizing Dogan and Lemley's approach for not recognizing the need for publicity rights in situations where a celebrity persona is being used without permission but there is no implied endorsement by the celebrity).

[255] A wall once existed between movie and sports stars and other elites. Madow, *supra* note 2, at 226; *see also* Evans, *supra* note 172, at 16 (noting that theorists have noticed the erosion of boundaries between all forms of celebrity and high society). For example, serious artists used to see themselves as removed from majority culture. In recent decades, however, this tension has been successfully negotiated by celebrities. One can be both famous and a revered artist. *See* SCHICKEL, *supra* note 141, at 239 (noting that Andy Warhol capitalized on his celebrity through his work). Meanwhile, artists and writers use the same publicity techniques as movie stars, sometimes working to make themselves into public figures before generating any significant corpus of artistic work. REIN ET AL., *supra* note 122, at 87.

[256] *In re* Grand Jury Subpoenas, 265 F. Supp. 2d 321, 331 (S.D.N.Y. 2003) (during the criminal prosecution of Martha Stewart, the court, responding to a discovery request for Stewart's public relations firms, treated the public relations firms as consultants and compared their role to that of non-testifying experts or jury consultants who may enjoy attorney-client privilege).

[257] *See, e.g.*, *Law Hall of Fame*, DUHAIME.ORG, http://www.duhaime.org/LawMuseum/LawArticle-46/The-Laws-Hall-of-Fame.aspx (last visited Sept. 16, 2011); *Law Job Star*, LAWCROSSING, http://www.lawcrossing.com/article/lcarticlearchive.php?type=92# (last visited Sept. 16, 2011).

[258] *E.g.*, ABOVE THE LAW, http://abovethelaw.com/ (last visited Sept. 16, 2011); ROLLONFRIDAY, http://www.rollonfriday.com/ (last visited Sept. 16, 2011); *see also* Leigh Jones, *Gossip Blogs Bedevil Law Firms*, NAT'L L.J., June 2, 2008, at 1, 10.

[259] Robert W. Wood, *When High Priced Lawyers Are Tax Deductible*, N.Y. STATE BAR ASS'N. J., Feb. 2007, at 11.

[260] ROBIN D. BARNES, OUTRAGEOUS INVASIONS 178–79 (2010); Wood, *supra* note 259, at 11.

[261] Richard K. Sherwin, *Celebrity Lawyers and the Cult of Personality*, 46 N.Y.L. SCH. L. REV. 517, 518 (2003).

[262] *Id.* at 522.

shown that a new era of celebrity involvement in the lawmaking process began in the Reagan era.[263] Not only did celebrities in that period increasingly transition to careers in politics, but in the 1980s celebrities also began to regularly testify before legislative committees.[264] She argues that modern politicians accept celebrities as having a salutary role in policymaking, something their predecessors would not have agreed with.[265] Celebrities are now advised to inject themselves into the political discourse as a career move.[266] At the same time, politicians have come to adopt the same publicity strategies as movie stars and athletes, employing more personal narratives in appeals to voters and giving greater attention to the construction of images.[267] In turn, the modern news media further celebritizes politicians, spending the bulk of its investigative resources on private aspects that arguably have little to do with a politician's official role.[268] The recent breakdown of boundaries between celebrities and political elites offers one explanation for the rapid manner in which celebrities captured special legal rewards for their status during the 1980s. Rather than worrying about the psychological effects of fame, political leaders, lawyers, and judges participate in the same publicity exercises as the famous and provide specialized privileges to encourage fame's pursuit.[269]

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[263] Linda J. Demaine, *Navigating Policy by the Stars: The Influence of Celebrity Entertainers on Federal Lawmaking*, 25 J.L. & POL. 83, 86, 135 (2009).

[264] *Id.* at 87–88

[265] *Id.* at 90–91, 132; *see also* TURNER, *supra* note 112, at 133 (describing the increasing role of celebrities in politics).

[266] MARSHALL, *supra* note 155, at 110; Demaine, *supra* note 263, at 94.

[267] Evans, *supra* note 172, at 45; *see also* MARSHALL, *supra* note 155, at 19 (noting that the division between politicians and celebrities has blurred because of a "convergence in [their] source of power"); TURNER, *supra* note 112, at 132 (noting that political strategies are being derived "from the celebrity industry's methods for building the public identity of the celebrity-commodity").

[268] *See* Bonner, *supra* note 233, at 92 (noting how political stories have become infused with a "human interest" element); John Corner, *Mediated Persona and Political Culture*, *in* MEDIA AND THE RESTYLING OF POLITICS: CONSUMERISM, CELEBRITY AND CYNICISM 67, 76–78 (John Corner & Dick Pels eds., 2003) (discussing "journalistic surveillance" into politicians' "off-duty" lives).

[269] MARSHALL, *supra* note 155, at 19 (discussing convergence of forms of power in modern society as the line between political and entertainment elites diminished). The more your particular group can be viewed as keeping company with other high status groups, the more status that is conferred on your own group. Murray Milner Jr., *Celebrity Culture as a Status System*, HEDGEHOG REV., Spring 2005, at 66, 69. Other recent legal initiatives provide particularized protections for celebrities and reveal that, instead of emphasizing the corrupting nature of fame, lawmakers are concerned with the special challenges celebrities face from other members of society. Some commentators suggest that celebrities should have their own special courts suited to their particular legal problems. Craig Matsuda, *Courting the Stars: Why the Legal System Needs New(s) Thinking for Overpowering Celebrity Trials*, 39 LOY. L.A. L. REV. 1223, 1223 (2006). Anti-paparazzi laws have been passed to protect celebrities from the outside world. *E.g.*, CAL. CIV. CODE § 1708 (West 2009). Furthermore, perhaps most analogous to publicity rights, trademark rules have been altered to aid celebrity plaintiffs. When the plaintiff is a celebrity, courts have relaxed the rules that typically apply to trademark holders in false endorsement cases. Although the typical trademark plaintiff must prove

V. MAKING CELEBRITY POLITICALLY PALATABLE

In the last years of the twentieth century, special protections for celebrities suddenly became a safe political bet. As suggested above, part of the answer can be found in the changing understandings of the economic and psychological bases for celebrity, which were in turn fueled by technological and social change. But as celebrity became more rational and lucrative, it also became more democratic. Originally, celebrity status was something that only applied to a rarified few. In the 1980s and 1990s, however, the perceived relationship between the famous and their audiences changed in ways that appeared more inclusive and, hence, made special legislation benefitting celebrities more politically palatable. Meanwhile, political coalitions developed that overwhelmed those interest groups still opposed to celebrity rights. Celebrities, their heirs, and their licensing agencies flexed their increasing economic and political muscle and co-opted key rivals en route to convincing legislators to enact broader and more long-lasting publicity rights.

A. *From Elite to Ordinary*

The social history of celebrity is intimately linked with changing understandings of what it means to be famous. Rather than being a static concept, fame has meant different things to different generations of Americans. Lawmakers establishing the right of publicity in the 1950s and 1960s acted in the context of a particular view of what it meant to be famous, and this view led to several restrictions on the right. Although lawmakers understood the economic potential of celebrity, another concern prevented them from embracing strong property rights in celebrity personas. Instead of being something that anyone could potentially enjoy, fame was reserved for a select group that had demonstrated great achievement. As a result, the privileges afforded by the right of publicity were fundamentally undemocratic. Not everyone could be great, not everyone had equal access to the spotlight, and this caused reluctance in awarding special legal protections to celebrities.

In time, however, this view of fame faded and celebrity became democratized. Lawmakers in the 1980s and 1990s acted under a different

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standing by demonstrating a public association between the mark at issue and the goods or services offered, this requirement is waived for celebrities. Beser, *supra* note 89, at 1804–05; *see also e.g.*, Parks v. LaFace Records, 329 F.3d 437, 447 (6th Cir. 2003) (holding that Rosa Parks' international recognition gave her name a protected trademark interest). Similarly, a celebrity that has avoided the public eye or fallen out of public favor can still prosecute a claim for trademark infringement even though trademark law's abandonment doctrine typically blocks infringement suits from plaintiffs that have not used their mark for a significant period of time. Beser, *supra* note 89, at 1808–10; *see also* Abdul-Jabbar v. Gen. Motors Corp., 85 F.3d 407, 409, 411 (9th Cir. 1996) (holding that a celebrity name can still be protected under the Lanham Act even if it has not been used for a long time).

understanding of fame. The proliferation of celebrity, on television and online, reduced the distance between a celebrity and her audience. Marketers encouraged a more democratic view of celebrity because they thought it would help their bottom line. As a result, celebrity came to be viewed as a phenomenon available to all. People were celebrities not because of their outside achievements or inner greatness, but because they had somehow engineered enough media exposure to capture public attention. Now lawmakers and judges could create special privileges for famous actors and athletes and still believe that they were serving the general public.

1. *Earlier Views of Fame*

Until the last part of the twentieth century, fame remained tied to some form of greatness in the popular imagination. Discourses of the nineteenth and early twentieth centuries spoke of rises to fame based on merit.[270] During this period, "famous men and great men were pretty nearly the same group."[271] Fame went to those whose accomplishments placed them ahead of the rest.[272] Average citizens did not attempt to get on the radio or the television because they believed that fame required accomplishment, not just publicity.[273]

Although every celebrity needs an audience, fame in this period was not believed to require popular ratification. In his description of early accounts of Hollywood celebrities, Joshua Gamson writes that the greatness necessary for stardom involved "virtue, genius, character, or skill that did not depend on audience recognition."[274] In other words, the greatness linked to fame relied on special qualities inherent to the celebrity herself. The ability to win over the public was not a part of this greatness, but rather a byproduct of it. The link between fame and inner greatness made celebrity an elite phenomenon. Inner greatness was a precondition for celebrity, and this greatness only resided in a select few.

Early narratives of fame represented an aristocratic sense of social ordering. Studios in the first half of the twentieth century controlled the publicity of their actors and actresses and tried to communicate a sense of unapproachability.[275] Film stars from this era were described as

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[270] *See* GAMSON, *supra* note 75, at 6.

[271] BOORSTIN, *supra* note 236, at xxvii.

[272] *See* LEO BRAUDY, THE FRENZY OF RENOWN: FAME AND ITS HISTORY 506 (1986).

[273] *See* CASHMORE, *supra* note 4, at 192 ("Fame, recognition, and distinction were usually attendant on achieving something of value.").

[274] GAMSON, *supra* note 75, at 7.

[275] DANIEL HERWITZ, THE STAR AS ICON: CELEBRITY IN THE AGE OF MASS CONSUMPTION 15 (2008); *see also* Ben Brantley, *Whatever Happened to Mystery?*, N.Y. TIMES, July 18, 2010, at ST1 (describing a 1920s publicity image of Greta Garbo's head grafted onto the body of sphinx).

"royalty."[276] Studio publicity machines often concocted stories of origin for their stars demonstrating noble ancestry.[277] Movie star profiles emphasized their god-like qualities. A 1935 *Photoplay* description of actress Loretta Young pronounced her "one of the most ethereally beautiful women in the world," claimed she was "born to be loved and cherished by men," and concluded that "[i]n other ages, men would have fought for her favor, gladiators would have ridden to death for her glove."[278] Even the experience of sitting in a movie theatre encouraged a view of the stars as "outsized and fantastic."[279] It was no accident that the theatres where they appeared before American audiences were billed as "palaces."[280]

Over time, the studios became less restrictive in how they defined the greatness necessary for stardom. The aristocratic notion of celebrity was in tension with a rapidly expanding consumer culture. Businesses needed celebrities to act not as unapproachable icons but as consumptive exemplars. Advertising and celebrity reinforced each other, training consumers in the need for consumption and identifying sources of authority for understanding how to consume.[281] As a result, instead of being a byproduct of some sort of aristocratic greatness, fame became re-described as the reward given to people who had a particular combination of "talent" and "star quality."[282] Actors and actresses were portrayed as having an inner charisma that made them deserving of celebrity, while still possessing the same interests as the general public.[283] Some publicists began to emphasize the mundane, attempting to prove that the movie stars engaged in the same leisure activities as the rest of us.[284]

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[276] *E.g.*, JIB FOWLES, STARSTRUCK: CELEBRITY PERFORMERS AND THE AMERICAN PUBLIC 17 (1992) (referring to her career in the 1920s, Gloria Swanson stated, "[i]n those days the public wanted us to live like kings and queens. So we did—and why not?"); Carl Van Vechten, *Hollywood Royalty*, VANITY FAIR, July 1927, at 38.

[277] *See* ALEXANDER WALKER, STARDOM: THE HOLLYWOOD PHENOMENON 51–52 (1970) (discussing how audiences were told that actress Theda Bara was an Egyptian-born daughter of a French actress and an Italian sculptor, when in reality she was the daughter of a tailor from Cincinnati).

[278] *Loretta Young Is: The Beauty Who Cannot Stay in Love*, PHOTOPLAY, Sept. 1935.

[279] FOWLES, *supra* note 276, at 34.

[280] Charlotte Herzog, *The Movie Palace and the Theatrical Sources of Its Architectural Style*, CINEMA J., Spring 1981, at 15, 15.

[281] Just as repetition of a particular commercial message could produce an emotional link with the consumer, the new communicative technologies of photography, radio, and motion pictures created similar affective bonds through familiarity with a particular person's voice and image. *See* BRAUDY, *supra* note 272, at 584 (discussing repetitive familiarization of audience with celebrity images); Armstrong, *supra* note 3, at 457–61 (linking increasing use of images by early twentieth-century advertisers with changing normative views of celebrity).

[282] GAMSON, *supra* note 75, at 6.

[283] *Id.* at 7–8 (describing how the presentation of celebrities became more "mortal" during this time period); *cf.* HALPERN, *supra* note 106, at 150 (describing the demystification of movie stars over course the of the twentieth century).

[284] *See* GAMSON, *supra* note 75, at 7–8 (describing examples of magazines that portrayed celebrities as living "quietly" in "sensible and sound" homes).

Yet celebrity narratives of the mid-twentieth century, despite becoming somewhat more inclusive, still emphasized celebrity's exclusive nature. As media studies scholar Ellis Cashmore chronicles:

> The 1950s and early 1960s defined a kind of golden age of glamour. Hollywood stars, in particular, were parts of a pantheon: like deities, they seemed to exist at a level above that of other mortals. They lived lives of such opulence, such splendor, such sublime beauty that they seemed unapproachable.[285]

The qualities that the stars supposedly had that justified their stardom were not qualities found in others. Publicists described celebrity childhoods in a way that made it seem that the individual always possessed that indescribable star quality.[286] "Talent" represented a particular sort of individual character that few people possessed. A study of self-help guides on stardom from the era offers some difficult advice: There is "no recipe" for stardom for "[w]hat matters is the gift."[287] The public could not confer the greatness necessary to celebrity; it was innate.

Celebrity status was also presented as something that could not be planned or strategized; instead one needed to be discovered.[288] Hard work might help someone rise to prominence, but it could not actually create the qualities needed for fame.[289] Instead, "[f]ame, based on an indefinable internal quality of the self, was natural, almost predestined."[290] During this period, stories of achieving celebrity typically involved discovery by some third party that plucked the individual out of obscurity. But the "discovery" was treated as inevitable, as relying exclusively on the new celebrity's own unique talents, rather than the publicity skills of her handlers.[291] Explaining celebrity origins in this manner ensured that publicity did not intrude on a narrative focused on individual merit. The legend of Lana Turner being discovered sitting in a Hollywood soda shop, and immediately placed into the movies, emphasized how the natural

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[285] CASHMORE, *supra* note 4, at 19; *see also* TURNER, *supra* note 112, at 120 (describing the glamorous portrayal of celebrities in the 1950s that emphasized the distance between them and their audience).

[286] *See* LEO LOWENTHAL, LITERATURE, POPULAR CULTURE, AND SOCIETY 124–25 (1961) ("A man is an actor, a doctor, a dancer, an entrepreneur, and he always was . . . . [Children are] rubber stamped with and for a certain function.").

[287] GAMSON, *supra* note 75, at 8 (quoting EDGAR MORIN, THE STARS 51 (1960)).

[288] *See* REIN ET AL., *supra* note 122, at 24 (explaining the shift from the idea of "discovering" celebrities to a new "breeding model").

[289] GAMSON, *supra* note 75, at 8.

[290] *Id.*

[291] *Id.*; *see also* TURNER, *supra* note 112, at 96 (describing "discovery" of film stars as part of the "legitimating myth of success").

qualities of the star made her stand out even amidst everyday activities.[292] No publicity machine or other efforts at visibility building were necessary to make Lana Turner famous. The characteristics of the true star naturally rose to the surface. Celebrity was still reserved for a chosen few, those with the inner greatness that justified stardom.

2. *Modern Understanding of Fame*

By the 1980s, however, the understanding of fame as dependent on achievement had changed. With a proliferation of media outlets, particularly on the new phenomenon of cable television, more and more celebrities were needed.[293] Although narratives discussing a celebrity's destiny or inner talents still existed, in large part, greatness became decoupled from celebrity.[294] In a prescient article, Barbara Goldsmith showed in 1983 that talent and fame were no longer linked.[295] Among several examples, she cited the wife of auto-executive John DeLorean who became famous in the 1980s merely because she had a husband who was arrested for dealing cocaine.[296] Other cultural observers concluded that fame no longer waited for accomplishment.[297] As evidence, they could point to nascent artists that became overnight sensations in the 1980s before even displaying their works.[298] Rather than slowly building a corpus of work and refining their technique on the way to stardom, painters Jean-Michel Basquiat and Keith Haring catapulted to the top of the art world in a few short years.[299] The same became true of star athletes. One might think that athletes would have to wait to become celebrities until enough time had passed for them to demonstrate achievement on the field, but modern athletes receive lucrative global endorsement deals without

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[292] GAMSON, *supra* note 75, at 8.

[293] *See* HALPERN, *supra* note 106, at 114–15 (explaining that the rise of television talk shows allowed more celebrities to be showcased); PINSKY & YOUNG, *supra* note 132, at 39 (suggesting that it was the rise of television as well as the Internet that brought a new array of celebrities into mainstream media).

[294] *See* BRAUDY, *supra* note 272, at 6 (explaining that modern fame is motivated not by a desire for recognition for worthy actions but from a desire to use visibility for self-fulfillment).

[295] Barbara Goldsmith, *The Meaning of Celebrity*, N.Y. TIMES, Dec. 4, 1983, at 75; *see also* HERWITZ, *supra* note 275, at 138 (discussing how expansion of media led to an "increasing need to divorce [celebrities] from values of talent"); PINSKY & YOUNG, *supra* note 132, at 59 ("Celebrity has become uncoupled from talent or performance; today, being famous seems like a game anyone can play.").

[296] Goldsmith, *supra* note 295, at 75.

[297] *See* BOORSTIN, *supra* note 236, at 57 ("The celebrity is a person who is known for his well-knownness."); LASCH, *supra* note 182, at 121 (explaining that the rise in popularity of sports stars came not necessarily from their on-field performance, but also from mass promotion and marketing); REIN ET AL., *supra* note 122, at 14 (arguing that visibility was valuable in itself, in contrast to prior decades where visibility only had value when linked to achievement).

[298] REIN ET AL., *supra* note 122, at 157.

[299] Cathleen McGuigan, *New Art, New Money*, N.Y. TIMES MAG., Feb. 10, 1985, at 20.

ever achieving a significant milestone in their sport.[300] The celebrity power of sports stars like Anna Kournikova and David Beckham bears little relationship to their actual competitive skills.[301] In the last part of the twentieth century, fame came to refer to achieving visibility at a particular moment as opposed to doing something so impressive that the actor became a part of history.[302]

Under the new view of fame, skill at self presentation became more crucial than any other ability.[303] Rather than inexorably becoming known because of inner talents, the modern celebrity manages to muscle her way into the media cycle regardless of any other inner abilities. Celebrities are now judged not on their outside accomplishments, but on their capabilities in the glare of the public spotlight.[304] Madonna, the quintessential 1980s celebrity, is usually described in terms of her gift for audience attraction, not her innate talents as a songstress or actor.[305] Madonna's career marked a new era in celebrity making where the focus was on capturing audience attention—even if that meant more and more revelation of supposedly private details that had been kept out of view in the past.[306] A new focus on self-promotion replaced the old emphasis on discovery of individuals with the inner resources for celebrity.[307]

With fame no longer tethered to narratives of inner greatness and outside accomplishment, the 1980s ushered in a new sense that anyone could become a celebrity, not just the talented.[308] Modern celebrity narratives reflect this demystification of the famous. The unapproachable movie stars of early film have been replaced with accessible everymans

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[300] *See* CASHMORE, *supra* note 4, at 241 (describing the early stardom of LeBron James and Michelle Wie); SEGRAVE, *supra* note 99, at 142 (discussing the thirty-one million dollar endorsement deal Tiger Woods inked with Nike before he even began his professional career).

[301] TURNER, *supra* note 112, at 19; *see also* Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225, 259 (2005) (using Anna Kournikova as an example of the reality that many commercially marketable athletes are not at the top of their sport).

[302] BRAUDY, *supra* note 272, at 539; *see also* TURNER, *supra* note 112, at 63 (describing the modern approach to celebrity as an objective, rather than a result, of personal activity).

[303] REIN ET AL., *supra* note 122, at 14; *see also* PINSKY & YOUNG, *supra* note 132, at 146 ("The idea of fame as a reward for merit has been replaced by a belief that just getting noticed is enough."); REIN ET AL., *supra* note 122, at 24, 61 (maintaining that American society has moved from a "discovery model" of celebrity to a "breeding model" and explaining, "most aspirants [to celebrity] achieve high visibility not as a result of irrepressible talent or accident, but rather because of a strategic marketing process").

[304] BRAUDY, *supra* note 272, at 573.

[305] *See* CASHMORE, *supra* note 4, at 7; GLEN JEANSOME, A TIME OF PARADOX: AMERICA SINCE 1890 443–44 (2006).

[306] CASHMORE, *supra* note 4, at 43, 49.

[307] One prominent media critic described the new view of how to become famous as "if you never shut up, no one can forget you." Brantley, *supra* note 275, at ST1.

[308] Andy Warhol famously articulated this decoupling of fame and achievement fifteen years earlier by claiming that "[i]n the future everyone will be world famous for fifteen minutes." THE OXFORD DICTIONARY OF QUOTATIONS 803 (Elizabeth Knowles ed., 5th ed. 1999).

and everywomans.[309] *People* magazine now places human interest stories of normal folk right next to the photospreads of Oscar winners and rock and roll stars.[310] More and more of our celebrities appear on television or online, no longer meant to look like larger than life gods and goddesses on the big screen.[311] Instead, today's celebrity personas are constructed around conceptions of familiarity, rather than difference.[312] Talk shows, although scripted, offer a less hierarchical presentation of the famous to the public than in prior formats for celebrity publicity.[313] The narrative of reality shows focuses on what happens when ordinary people are placed in the publicity machine. *Big Brother* participants, for example, are picked, not for their unique qualities, but for their ability to represent everyone else.[314] Technology also had a role in deglamorizing celebrities as devices for photographing and reproducing photographs ensured that the public had easy access to candid images of the famous.[315] Today, we routinely see photographs of celebrities in the course of their daily activities without makeup—and sometimes without clothing—that would not have been available years ago. By portraying celebrities as regular people, the media have made fame more egalitarian. Not everyone can be great, but everyone has a chance to be a celebrity.[316]

At the same time, businesses became more and more enamored with public figures who lacked any apparent qualification for their fame. Modern marketing texts stress the value of "manufactured celebrities" over stars with great talent because the former lack the bargaining power of the latter and can be exploited to the full potential of media companies and advertisers.[317] As a result, advertisers have created their own celebrities, like Jared for Subway and Steven the slacker for Dell Computers, that offer no underlying talent or record of accomplishment to justify their notoriety.[318] Businesses quickly sign "accidental" celebrities like Kevin Federline, Levi Johnston, Kato Kaelin, and Donna Rice to endorsement

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[309] *See* HERWITZ, *supra* note 275, at 15 (discussing the understanding by film studios that there needed to be a sense of unapproachability for movie stars of the studio era).

[310] HALPERN, *supra* note 106, at 150–51.

[311] GRAEME TURNER, ORDINARY PEOPLE AND THE MEDIA: THE DEMOTIC TURN 12 (2010).

[312] HERWITZ, *supra* note 275, at 103.

[313] MARSHALL, *supra* note 155, at 124–25.

[314] TURNER, *supra* note 311, at 12–13.

[315] *See* Brantley, *supra* note 275, at ST1 (describing the effects of constant celebrity visibility).

[316] *See* TURNER, *supra* note 311, at 14 ("[T]hese trends have resulted in the idea of celebrity itself mutating: no longer a magical condition, research suggests that it is fast becoming an almost reasonable expectation for us to have of our everyday lives.").

[317] *See* Egon Franck & Stephan Nüesch, *Avoiding 'Star Wars'—Celebrity Creation as Media Strategy*, 60 KYKLOS 211, 227 (2007) (noting the dependence "manufactured celebrities" have on the programs that made them visible).

[318] Swerdlow & Swerdlow, *supra* note 98, at 14.

deals the moment they hit the public consciousness.[319] Paris Hilton has been described as "the perfect post-modern celebrity" because there is no awareness or expectation of talent to get in the way of her image.[320] Her fame speaks entirely for itself and that fame has translated into great commercial success.[321]

Even the increasing popularity of the word "celebrity" demonstrates a shift whereby fame became the reward not for achievement, but for exposure.[322] Although modern use of the term began in the mid-1800s,[323] "celebrity" began to be used with greater and greater frequency in the media beginning in the 1960s.[324] Before, the term "star" had been favored.[325] "Star" suggests a connection to the individual's profession, whether it be as an actor, an athlete, or something else. On the other hand, "celebrity" represents the popularized version of the individual regardless of her professional status.[326] Now it is commonplace to refer to modern American life as a "celebrity culture."[327] In other words, much of our culture now emphasizes being known as opposed to being great.

3. *Democratizing the Law of Celebrity*

The new democratic notion of fame found purchase in legislatures and courts, and may provide one explanation for the expansion of celebrity rights in the 1980s and 1990s, as described in Part II. Lawmakers in this period trumpeted the democratic nature of celebrity, affirming that everyone, not just celebrities, had the opportunity to become famous and enjoy the particularized protection of the right of publicity.

Prior cases and commentaries suggested that the availability of the

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[319] Maureen Dowd, *'No Excuses' Jeans Pays Clinton Accuser $50,000*, N.Y. TIMES, June 24, 1994, at A12; Stuart Elliott, *Colts and Bears and Kevin Federline*, N.Y. TIMES, Feb. 2, 2007, at C1; *Simpson Civil Case; Where Are They Now?*, L.A. TIMES, Feb. 11, 1997, at A16; Courtney Hazlett, *Nuts!: Levi Johnston in Pistachio Ad*, MSNBC.COM (Oct. 5, 2009, 10:20 PM), http://today.msnbc.msn.com/id/33180490/ns/today-entertainment/t/talk-about-nuts-levi-johnston-pistachio-ad/.

[320] Alan Behr & Andria Beeler-Norrholm, *Fame, Fortune, and the Occasional Branding Misstep: When Good Celebrities Go Bad*, INTELL. PROP. & TECH. L.J., Nov. 2006, at 6, 9.

[321] *See* Goldberg v. Paris Hilton Entm't, Inc., No. 08-2261-CIV, 2009 WL 2525482, at *1 (S.D. Fla. Aug. 17, 2009) (stating that producers of a feature film paid Hilton one million dollars, not for her acting prowess, but because they hoped to capitalize off of the "Paris Hilton brand").

[322] Kwall, *supra* note 233, at 7; *see also* CASHMORE, *supra* note 4, at 7 ("A peculiarity of celebrity culture is the shift of emphasis from achievement-based fame to media-driven renown.").

[323] Kwall, *supra* note 233, at 7.

[324] *Id.* at 8.

[325] Jessica Evans, *Introduction*, *in* UNDERSTANDING MEDIA: INSIDE CELEBRITY, *supra* note 173, at 1, 4.

[326] HERWITZ, *supra* note 275, at 16; Evans, *supra* note 173, at 1, 4.

[327] *See, e.g.*, Paul M. Schwartz, *From Victorian Secrets to Cyberspace Shaming*, 76 U. CHI. L. REV. 1407, 1420 (2009) (reviewing LAWRENCE FRIEDMAN, GUARDING LIFE'S DARK SECRETS: LEGAL AND SOCIAL CONTROLS OVER REPUTATION, PROPRIETY, AND PRIVACY (2007)) (noting the original author's description of the rise of celebrity culture); Amy Henderson, *Media and the Rise of Celebrity Culture*, MAG. HIST., Spring 1992, at 49.

right of publicity was limited to a small group of people that had become famous and managed to trade on that fame. Hence, the Georgia Supreme Court explained that "while private citizens have the right of privacy, public figures have a similar right of publicity . . . ."[328] Another court explained that only "celebrities" possessed a claim for violations of the right.[329] Some scholars of the time contended that non-celebrities had to turn to the right of privacy—which did not provide any compensation for the economic value of the defendant's unauthorized use—because they had no right of publicity cause of action.[330] Others insisted that there be some proof that the plaintiff had been able to economically trade on her fame before a right of publicity suit could be recognized.[331] Either way, the legal benefits of the right of publicity were limited to a select few.

Occasionally, judicial concern over the anti-democratic implications of celebrity was made explicit. The Sixth Circuit offered a litany of reasons for why the right of publicity should not survive a famous individual.[332] What seemed most disconcerting to the court, however, was the prospect of the economic power of celebrity remaining in particular bloodlines for generations.[333] It explained that in the past, "the law has always thought that leaving a good name to one's children is sufficient reward in itself for the individual."[334] Placing the economic rewards of fame "in the hands of heirs is contrary to our legal tradition and somehow seems contrary to the moral presuppositions of our culture."[335] In 1979, the California Supreme Court hinted at the same argument, opposing a legal regime where a celebrity's heirs "are the only ones who should have the opportunity to exploit their ancestor's personality."[336]

In contrast, modern interpretation of the right of publicity stresses the right's egalitarian nature. The position of "the vast majority of

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[328] Martin Luther King, Jr. Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc., 296 S.E.2d 697, 703 (Ga. 1982).

[329] House v. Sports Films & Talents, Inc., 351 N.W.2d 684, 685 (Minn. Ct. App. 1984).

[330] *See* Richard B. Hoffman, *The Right of Publicity: An Update for Counseling Athletes and Other Celebrities*, MERCHANDISING REP., August 1983, at 9 ("A private citizen [has] only privacy, but not publicity, actions available to him."); Berkman, *supra* note 39, at 532–33 ("[I]t seems that a distinction must be drawn between the commercial appropriation of a private individual's name or picture and a similar appropriation from a public figure.").

[331] Peter L. Felcher & Edward L. Rubin, *Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577, 1591 n.78, 1613–14 (1979).

[332] *See* Memphis Dev. Found. v. Factors Etc., Inc., 616 F.2d 956, 959–60 (6th Cir. 1980) (noting line-drawing problems, lack of precedent, and the fact that changing the law wouldn't increase efficiency or productivity as arguments against recognizing the inheritability of the right of publicity).

[333] *See id.* (discussing why the court had "serious reservations about making fame the permanent right of a few individuals to the exclusion of the general public").

[334] *Id.* at 959.

[335] *Id.*

[336] Lugosi v. Universal Pictures, 603 P.2d 425, 430 (Cal. 1979).

commentators and courts is that everyone has a right of publicity."[337] Legislatures adopted the democratic view of celebrity, positing that celebrity status is not only possible for everyone, but that the possibility should be preserved and protected. Hence, Nevada's right of publicity statute stresses that "[t]here is a right of publicity in the name, voice, signature, photograph or likeness of every person."[338] Similarly, the legislative history of Washington's right of publicity law reveals that "[e]very individual residing in Washington has a property right in the use of his or her name, voice, signature, photograph, or likeness in any medium, in any manner."[339] Illinois' right of publicity law explains that "[t]he right to control and to choose whether and how to use an individual's identity for commercial purposes is recognized as each individual's right of publicity."[340]

One might argue that by emphasizing the egalitarian nature of the right, legislators were merely engaging in window dressing, trying to sell their constituents on a new law really meant to protect a rarified few. Simultaneous revisions in the judicial approach to the right of publicity suggest, however, that the changing social definition of celebrity was also responsible. Although judges are sensitive to public opinion, they have less interest in rallying public opinion than legislators.[341] Moreover, if judges had been interested in winning popular approval for the right, they should have talked up its democratic potential upon its arrival in the 1950s and not waited until the end of the twentieth century. It was only in the last years of the twentieth century that judges repeatedly took pains to note the universal eligibility for the right of publicity. Even though most right of publicity cases involve celebrity plaintiffs,[342] modern courts emphasize that the right, in principle, can apply to anyone. Hence, the California Court of Appeals stressed that California's right of publicity statute needed to be construed to include both celebrity and non-celebrity plaintiffs.[343] One judge explained: "I am convinced that the right of publicity resides in every person, not just famous and infamous individuals."[344] The Eleventh Circuit took pains to alter its definition of the right of publicity, replacing a 1982 decision that defined it as "a celebrity's right" with a new definition

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[337] 1 MCCARTHY, *supra* note 22, § 4:14.

[338] NEV. REV. STAT. § 597.790 (2010).

[339] H.B. 1074, 55th Leg., 2d Reg. Sess. (Wash. 1998).

[340] 765 ILL. COMP. STAT. 1075/10 (West 2009).

[341] *Cf.* Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061, 1063–64 (2010) (describing evidence that elected judges reach results more in keeping with local public opinion than appointed judges do).

[342] 1 MCCARTHY, *supra* note 22, § 4:14.

[343] KNB Enters. v. Matthews, 92 Cal. Rptr. 2d 713, 717 (Ct. App. 2000).

[344] Fanelle v. Lojack Corp., No. CIV. A. 99-4292, 2000 WL 1801270, at *11 (E.D. Pa. Dec. 7, 2000).

describing it as an "individual's right."[345] Rather than requiring previous commercial exploitation of one's identity, most courts have switched to a presumption that sufficient economic value in the identity exists if it has been commercially exploited by the defendant.[346] Even the *Restatement (Third) of Unfair Competition*, adopted in 1995, notes that the "identity of even an unknown person may possess commercial value," signaling that even non-celebrities can enjoy the right.[347]

In reality, not everyone can take advantage of the right of publicity.[348] It is frequently noted that the potential damages from infringement of the right hinge on the plaintiff's fame, but fame is not a threshold requirement for a suit.[349] Yet it seems unlikely that many rationally acting plaintiffs would prosecute a lawsuit for which they could obtain little if anything in damages.[350] Despite the assurances that the right applies to non-celebrities, non-celebrity claims have been dismissed for lack of any proven value in the plaintiff's identity.[351] Lawmakers' constant affirmation that everyone enjoys the right of publicity assures the public of the democratic nature of fame. Most citizens seem to believe that fame is close at hand.[352] In truth, celebrity status, and the right of publicity, can be enjoyed only by a rare few.

B. *Celebrity and Interest Group Politics*

"[T]he history of lobbying comes close to being the history of American legislation."[353] As described above, a number of states enacted new, broad right of publicity laws in the 1980s and 1990s. This Article

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[345] Toffoloni v. LFP Publ'g Grp., LLC, 572 F.3d 1201, 1205 (11th Cir. 2009) (quoting Martin Luther King, Jr. Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc., 296 S.E.2d 697, 700 (Ga. 1982)); *see also* Cheatham v. Paisano Publ'ns, Inc., 891 F. Supp. 381, 386 (W.D. Ky. 1995) (noting, in the first case to address the issue, that "celebrity status" is not a prerequisite for such a claim under Kentucky's common law right of publicity); Onassis v. Christian Dior-New York, Inc., 472 N.Y.S.2d 254, 260 (N.Y. Sup. Ct. 1984) ("[A]ll persons, of whatever station in life, from the relatively unknown to the world famous, are to be secured against rapacious commercial exploitation.").

[346] 1 MCCARTHY, *supra* note 22, § 4:17; *see, e.g.*, Ainsworth v. Century Supply Co., 693 N.E.2d 510, 514–15 (Ill. App. Ct. 1998) (holding that plaintiff may recover damages where defendant received commercial benefit from unauthorized use of plaintiff's image).

[347] RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. d (1995); *see also id.* § 49 cmt. d ("[N]on-celebrities may recover the commercial value of the defendant's use.").

[348] *See* K.J. Greene, *Intellectual Property Expansion: The Good, the Bad, and the Right of Publicity*, 11 CHAP. L. REV. 521, 536–38 (2008) (describing the difficulties non-celebrities face in attempting to establish a right of publicity cause of action).

[349] *See* KNB Enters. v. Matthews, 92 Cal. Rptr. 2d 713, 717 (Ct. App. 2000).

[350] *See* Greene, *supra* note 348, at 538.

[351] *E.g.*, Hooker v. Columbia Pictures Indus., Inc., 551 F. Supp. 1060, 1062 (N.D. Ill. 1982); Cox v. Hatch, 761 P.2d 556, 564 (Utah 1988).

[352] *See* HALPERN, *supra* note 106, at 196 (recounting 2005 study where thirty-one percent of American teenagers believed that they would be famous someday).

[353] EDGAR LANE, LOBBYING AND THE LAW 18 (1964).

suggests that lawmakers were motivated by new perspectives on celebrity, recognizing democratic potential and economic rationality where once they saw elitism and the dangers of mob psychology. Yet legislators were influenced not only by these new perspectives on celebrity, but also by a furious lobbying campaign conducted by the famous, their heirs, and the licensing companies that stood to gain the most from expanding celebrity rights. These groups took advantage of the social and technological changes described earlier to pass sweeping celebrity rights bills through statehouses across the country. The remainder of this Section describes the interest groups that formed a successful political coalition for broadened publicity rights at the end of the century. A variety of stakeholders are interested in regulation of commercial use of celebrity personas. On one side are those parties that desire plenary protection against all unauthorized uses of celebrity. On the other side are those who oppose celebrity publicity rights because they have their own interest in exploiting celebrity personas without restriction. In the middle are the media companies that have reasons to both support and to reject expansion of the right of publicity.

1. *Celebrities and Other Assigned Rights Holders*

Celebrities and their heirs are naturally interested in broader publicity rights. The historical record certainly suggests that celebrity lobbying had an effect on the legislators considering these rights in the 1980s and 1990s.[354] It was no accident that the states that passed particularly strong right of publicity laws also served as the domiciles for entertainers with obvious postmortem commercial value. Hence, the laws enacted in Indiana, Tennessee, and Washington benefitted the estates of James Dean, Elvis Presley, and Jimi Hendrix. Texas's postmortem statute was dubbed the "Buddy Holly Bill" because of the testimony of his widow on behalf of the legislation.[355] In California, the heirs of John Wayne, Groucho Marx, and Marilyn Monroe have all been involved in various legislative enhancements of that state's right of publicity.[356] In an analysis of the

[354] *See* Kathy Heller, *Deciding Who Cashes in on the Deceased Celebrity Business*, 11 CHAP. L. REV. 545, 549–50 (2008) (crediting celebrities and their heirs with prompting the passage of a descendible right of publicity in California); Mark G. Tratos & Stephen Weizenecker, *Dead Celebrity Wars*, ENT. & SPORTS LAW., Summer 2007, at 16 (stating that implementation of California's postmortem statute "was in no small part because of the efforts of the Marilyn Monroe estate").

[355] 1 MCCARTHY, *supra* note 22, § 6:120.

[356] Joseph J. Beard, *Fresh Flowers for Forest Lawn: Amendment of the California Post-Mortem Right of Publicity Statute*, ENT. & SPORTS LAW., Winter 2000, at 23; Stephen F. Rohde, *Dracula: Still Undead*, CAL. LAW., Apr. 1985, at 51, 52–53; Tratos & Weizenecker, *supra* note 354, at 16; *see also* Thomas F. Zuber, *Everlasting Fame: Recent Legislation Has Clarified the Descendible Right of Publicity for Personalities Who Died Prior to 1985*, L.A. LAW., May 2009, at 30–31 (describing the central role of Fred Astaire's widow in producing the legislation that expanded California's right of publicity protections in 1999).

1985 law that first enacted protections for deceased personalities' publicity rights, the California Senate Judiciary Committee contended that testimony from "the son of W.C. Fields, Priscilla Presley, and Burt Lancaster apparently convinced the [Senate Judiciary] committee and the Legislature that increasing protections for those rights . . . were called for."[357] A 1999 revision of that law, which further strengthened publicity rights in that state, was deemed the Astaire Celebrity Image Protection Act because it had been championed by Robyn Astaire, Fred Astaire's widow.[358] Also, in California, the Screen Actors Guild, a union representing celebrities and celebrity hopefuls, was critical in persuading the legislature to enact the 1985 postmortem statute[359] as well as another law in 2007 that vests that right retroactively for celebrities who had already died before the 1985 law took effect.[360]

Licensing firms benefit from rights of longer duration and legal mechanisms for shutting down unlicensed competitors, making them natural supporters of enhanced publicity rights. In the 1980s, firms that specialized in the licensing of celebrity personas began to appear. The Roger Richman Agency, which represented the heirs of Albert Einstein, Sigmund Freud, Clark Gable, and Mae West, pressed for legislative change.[361] This period also witnessed the emergence of CMG Worldwide, a firm representing the commercial interests of the estates of deceased celebrities such as Babe Ruth, Jackie Robinson, and Humphrey Bogart as well as living clients such as Lauren Bacall and Sophia Loren.[362] Firms like CMG and the Richman Agency lobbied for postmortem protections that could provide a potential revenue stream that was large enough and stable enough to trigger serious investment and rights management.[363] These firms were instrumental in pushing forward expansion of celebrity

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[357] S. Judiciary Comm. Bill Analysis, S.B. 771, 2007–08 Reg. Sess., at 5 (Cal. 2007).

[358] 1 MCCARTHY, *supra* note 22, § 6:25.

[359] Rohde, *supra* note 356, at 52–53.

[360] *Postmortem Publicity Rights of Deceased Celebrities: Hearing on S.B. 771 Before the S. Rules Comm.*, 2007–08 Reg. Sess. 4 (Cal. 2007).

[361] Dennis Hevesi, *Afterlife of the Famous: Heirs Warn of 'Poachers,'* N.Y. TIMES, Feb. 26, 1988, at B1.

[362] *CMG Worldwide: Representing the Greatest Icons*, http://www.cmgworldwide.com/corporate/history.html (detailing the history of CMG); *see also* Leah Hoffman, *Agents of the Dead*, FORBES.COM (Oct. 31, 2005, 3:00 PM), http://www.forbes.com/2005/10/31/dead-celebrities-agents_cx_lh_1031deadagents_deadceleb05.html (discussing the introduction of boutique management to promote the rights of deceased celebrities).

[363] *See* Heller, *supra* note 354, at 545 (describing the licensing of postmortem rights as "one of the most valuable sources of income for a celebrity's estate"); Terrell & Smith, *supra* note 92, at 22 ("Investors (including the artist himself) would willingly pay more now for a right to exploit that will last far into the future than for a right that will disappear or diminish significantly at the artist's death.").

rights in the 1980s and 1990s.[364] The Indiana right of publicity statute, passed in 1994 and described as the most expansive publicity right in the nation, was drafted by the head of CMG Worldwide, which is based in Indianapolis.[365] One account discussing the most recent amendment to California's right of publicity describes it as "rushed through the legislature at the behest of a greedy licensee . . . ."[366] When CMG was a litigant in a high-profile case involving the estate of Marilyn Monroe and received an adverse decision from a federal court, it immediately reacted by hiring lobbyists to push a remedial bill through the California legislature.[367] In just a few weeks, the legislature passed new legislation to abrogate the decision and benefit CMG. By the end of the 1990s, thanks in part to the recognition of postmortem rights by numerous courts and state legislatures, licensing firms were generating millions of dollars in licensing fees from deceased celebrities,[368] a third of which they pocketed themselves.[369]

2. *Rival Copyright Interests*

On the other side of the ledger are those who resist any expansion of the right of publicity. One interest group opposing the right of publicity is made up of those who hold contrasting intellectual property rights potentially conflicting with celebrity rights. For example, photographers enjoy copyright protection for their photographs of deceased celebrities.[370] A new property right that vests in the celebrity herself (or the celebrity's heirs) threatens this benefit as a photographer licensing her celebrity photos may have to seek permission from the subject of that photograph or

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[364] *See* Michael Decker, Note, *Goodbye, Norma Jean: Marilyn Monroe and the Right of Publicity's Transformation at Death*, 27 CARDOZO ARTS & ENT. L.J. 243, 271 (2009) ("[I]t is licensing companies that are at the heart of the battle over the postmortem right of publicity.").

[365] *See* Decker, *supra* note 364, at 246 (noting that the Indiana right of publicity statute was propelled by Mark Roesler, CMG's Chief Executive Officer); Nancy Hass, *"I Seek Dead People,"* N.Y. TIMES, Oct. 12, 2003, at 38 ("Roesler [CMG CEO] . . . virtually created the 'right to publicity' for the heirs of deceased stars.").

[366] Zuber, *supra* note 356, at 29. The amendment was drafted and sponsored by the Screen Actors Guild, but at the behest of CMG Worldwide. *Id.* at 31 n.49.

[367] Gary Scott, *Protecting the Future of Marilyn's Past*, L.A. DAILY J., Oct. 8, 2007, at 1, 4.

[368] Greg Johnson, *Protecting Dead Icons Back for an Encore: Monroe, Bogart and Others Now Star in Commercials, Raising Thorny Legal and Financial Issues*, L.A. TIMES, Apr. 8, 1999, at C6; *see also* Decker, *supra* note 364, at 246 ("[CMG] reaps between $12 and $20 million in annual revenue by representing Monroe, Babe Ruth, James Dean, and more than 250 other deceased celebrities.").

[369] Hass, *supra* note 365, at 38. The value of celebrity postmortem rights continues to grow. Michael Jackson's estate grossed more than one billion dollars in the year after his death, including millions of dollars in licenses for celebrity merchandise. Jim Farber, *Wanna Be Selling Something: A Year After His Death, Michael Jackson Is the Ka-ching of Pop*, N.Y. DAILY NEWS, June 22, 2010 at 24; *Michael Jackson Has "Made $1bn" Since His Death*, BBC NEWS (June 22, 2010, 5:23 PM), http://www.bbc.co.uk/news/10373358.

[370] Tratos & Weizenecker, *supra* note 354, at 18.

risk a suit for infringement. Indeed, photographers have strongly opposed various legislative proposals to enhance publicity rights.[371] Other groups potentially opposed to celebrity rights are the publishing and advertising industries.[372]

It appears that for most states that have considered right of publicity legislation, the support of celebrities, licensing companies, and (as discussed later) movie and television studios has trumped opposition from photographers and others. Since the 1980s, when either courts or legislatures have considered the right of publicity, they have generally acted to expand the right, thereby enlarging celebrity economic power.[373]

3. *Studio Influence*

Another key interest group with a stake in this battle is the entertainment media, particularly movie and television studios. These entities have reasons to be somewhat ambivalent about celebrity rights. On the one hand, they may view an expanding right of publicity negatively. Efforts to generate new content could be jeopardized by vigorous publicity

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[371] *See* Heller, *supra* note 354, at 560 (describing photographers' opposition to California's 1985 postmortem rights bill); Senate Judiciary Comm. Bill Analysis, S.B. 771, 2007–08 Reg. Sess., at 5 (Cal. 2007) (describing letters of opposition from photographers, which claimed that proposed extension of publicity rights would "cause substantial damage to 'any business that is based on photographs or reproductions of famous people'"). One legal objection to state rights of publicity offered by photographers and other copyright holders is that such rights are preempted by federal copyright law. When a direct conflict exists between federal law and state law, the state law must yield. U.S. CONST. art. VI, cl. 1. A strong argument can be made that it is not permissible for a photographer's (or other copyright holder's) federal copyright in a celebrity image to be reduced in value by a state's decision to grant a competing publicity right to the celebrity herself. *See* Jennifer E. Rothman, *Copyright Preemption and the Right of Publicity*, 36 U.C. DAVIS L. REV. 199, 216 (2002) ("The right to display a work is severely limited by performers' publicity rights if such rights are never preempted by copyright law."). In general, however, most courts that have considered the question have determined that the subject matter of the right of publicity lies sufficiently outside of the scope of copyright such that there is no preemption. 2 MCCARTHY, *supra* note 22, § 11:50.

[372] *See, e.g.*, *Governor Joins Lawmakers on the Easy Road*, ARIZ. DAILY STAR, June 3, 2007, at A9 (showing the effect of right of publicity statutes on advertisers and free speech); Hevesi, *supra* note 361, at B1 (noting that magazine publishers were opposed to the New York State Celebrity Rights Act that included a right of publicity section).

[373] The lone exceptions have been Wisconsin and New York. The federal district court in Wisconsin has held that Wisconsin's common law right of publicity is limited to living persons. *See* Hagen v. Dahmer, No. 94-C-0485, 1995 WL 822644, at *4 (E.D. Wis. Oct. 13, 1995). New York courts have refused to recognize any common law right of publicity, forcing any publicity rights claims to be addressed under the terms of a 1903 statute for invasion of privacy. 1 MCCARTHY, *supra* note 22, § 6:74. Yet proposals for reforming New York law to bring it in line with the rest of the country have consistently been defeated. In 1988, hearings were held on a postmortem right, but the legislation failed. Decker, *supra* note 364, at 254. Other right of publicity bills proposed in 1989, 1990, 1991, 1993, and 1995 also failed to win support. In 2007, when a federal court in New York determined that the company holding the publicity rights to Marilyn Monroe's persona had no cause of action under New York law, again the legislature studied the issue of postmortem rights. Decker, *supra* note 364, at 244. Yet the proposed legislation, largely identical to legislation that passed in just a few weeks in California, failed to emerge from committee. Legislation proposed in 2008 met a similar fate.

rights or at least subjected to a significant payout to celebrities and celebrity heirs. For example, a studio wishing to develop a biopic of a famous, deceased musician might have to gain clearance from the musician's estate before going forward with its film. Because of these fears, in California, the Motion Picture Association of America ("MPAA"), as well as television networks CBS and NBC, opposed the initial granting of postmortem rights in 1985.[374] The studios have made similar arguments in opposing proposed legislation to create a postmortem right in New York.[375]

On the other hand, these content providers also have a countervailing interest in strong publicity rights. As discussed earlier, modern media conglomerates need celebrities to promote their content over multiple platforms.[376] Strong publicity rights help provide consistent control over celebrity images, thereby making this important component of modern media more stable and reliable. By limiting the number of ways to legally use a celebrity's persona, publicity rights inoculate that persona from the potentially dilutive effects of multiple speakers sending inconsistent messages about that celebrity. Movie and television studios provide the stages for the population to experience celebrity. These businesses want to preserve their own ability to use celebrity to attract viewers while at the same time making sure that these celebrities are not subject to radical reappropriations by others. Although the studios might prefer a return to the past when they controlled celebrity publicity, a strong right of publicity vested in the individual celebrity at least helps promote a consistent, and hopefully not oversaturated, image for their stars.

In large part, the story of the expanding right of publicity is a story of celebrity rights proponents incorporating the studios into their legislative proposals. The political clout wielded by the Hollywood studios has been documented in other contexts.[377] The industry's support became a critical factor in determining whether or not celebrity rights legislation would be passed. Although the motion picture studios originally opposed postmortem rights in California, they were able to secure significant changes in the proposed legislation that favored their own interests and tempered their opposition. Hence, the 1985 legislation was altered to exclude use of persona in "a play, book, magazine, musical composition,

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[374] Heller, *supra* note 354, at 550.

[375] *See* Zuber, *supra* note 356, at 31 (discussing the opposition to proposed New York legislation by groups such as the American Society of Magazine Photographers); *see also infra* note 389 and accompanying text.

[376] *See supra* Section III.A.

[377] *See, e.g.*, JESSICA LITMAN, DIGITAL COPYRIGHT 23 (2001) (describing Disney's successful lobbying effort to extend copyright protection for its Mickey Mouse character for an additional twenty years).

film, radio or television program other than an advertisement."[378] Texas's postmortem publicity right was drafted in consultation with the motion picture industry and, in the floor debate over the legislation, its sponsor urged its passage without any amendments, lest the industry withdraw its support.[379] One assemblyman objected to the legislation and to the movie studios' intimate role in its drafting, stating "I'm sure the motion picture industry signed off on it because they were specifically exempted so it doesn't apply to them."[380] Indeed, during discussions over the Texas bill, revisions were made to insure that uses of deceased celebrity names, likenesses, and voices could be made in films and television programs without violating the new law.[381]

More recent alterations to the California right of publicity have also won the studios' approval. In 1999, when the California legislature decided to grant celebrity heirs an additional twenty years of protection, extending control of postmortem publicity rights from fifty years beyond the date of death to seventy years beyond the date of death and eliminating several prior specific statutory exemptions, the television networks and motion picture studios agreed to the expansion.[382] A proposed provision within that legislation that would have prohibited, in expressive works, manipulation of deceased personas through digital technology was dropped at the behest of the MPAA.[383] Similarly, the studios managed to kill another provision that would have outlawed defamatory references to deceased celebrities in films and television shows. As one of the chief lobbyists for the MPAA explained after the passage of California's 1999 law, "new language" was added during the drafting process that "resolved our objections."[384] Most recently, the California legislature responded to a district court opinion holding that the estate of Marilyn Monroe had no publicity rights because a statutory descendible publicity right did not exist when she died in 1962.[385] Just a few weeks after this opinion issued, the legislature expanded celebrity postmortem rights by providing that such rights cover not just those celebrities who died when the original postmortem right was enacted in 1985, but also celebrities who died before 1985.[386] The studios made no opposition to this legislation.[387]

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[378] CAL. CIV. CODE § 990(n) (West 1992).

[379] *See* Audio tape: Texas House of Representatives, Floor Debate (Apr. 9, 1987) (on file with author).

[380] *See id.*

[381] H. Judicial Affairs Comm. Bill Analysis, H.B. 834, 1986–87 Reg. Sess. (Tex. 1987).

[382] Heller, *supra* note 354, at 554–55; Zuber, *supra* note 356, at 30–31.

[383] Beard, *supra* note 356, at 25.

[384] *Id.*

[385] Milton H. Greene Archives, Inc. v. CMG Worldwide, Inc., 568 F. Supp. 2d 1152, 1157–58 (C.D. Cal. 2008).

[386] 1 MCCARTHY, *supra* note 22, § 6:25.

In contrast, when the studios are not brought into the legislative process, proposed right of publicity laws die in committee. For example, in 2007, the New York legislature began consideration of a postmortem publicity right.[388] The exclusion of the media from involvement with the proposed legislation may well be one of the reasons it failed. In letters of opposition to the proposed legislation, several studios expressed their displeasure at not being included in the drafting process.[389] Given the political economy of celebrity rights, such proposals are much less likely to secure the necessary legislative support when studio concerns are ignored.

4. *Individual Consumers*

Individual consumers have an interest in this debate as well. In modern life, where most encounters are with strangers and individuals believe they have the ability to shape their own identities, celebrities serve as powerful cultural symbols. A decision to invoke a celebrity like Martha Stewart instantly communicates something about a person, something very different from the choice to invoke a celebrity like Ozzy Ozborne. Publicity rights threaten this process of identity formation and personal expression by giving the celebrity, or her estate, the power to determine which invocations of the celebrity persona are appropriate and which are not.[390]

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[387] Cal. Bill Analysis, SB 771, Assemb. Judiciary Comm., 2007–08 Reg. Sess. (Jul. 10, 2007) (listing those in support and opposition to the legislation); Cal. Bill Analysis, SB 771, S. Judiciary Comm., 2007–08 Reg. Sess. (Sept. 6, 2007) (same).

[388] State Assemb., A. 08836, 2007–08 Reg. Sess. (N.Y. 2007).

[389] *See, e.g.*, Letter from Stacey Byrnes, Senior Vice President & Intellectual Property Counsel, NBC Universal to The Honorable Helene Weinstein, New York State Assembly (June 20, 2007) (on file with author) (explaining that NBC was crafting its own bill that it had not yet had the opportunity to put before the legislature); Letter from Henry S. Hoberrman, Senior Vice President & Counsel, ABC, Inc. to The Honorable Helene Weinstein, New York State Assembly (June 19, 2007) (on file with author) ("We urge you to delay further action on the Bill in order to afford interested parties, including Disney, ESPN and ABC, the opportunity to present our views and discuss them with you and other legislators in a meaningful way."); Letter from Louise S. Sams, Executive Vice President & General Counsel, Turner Broadcasting System, Inc. to The Honorable Helene Weinstein, New York State Assembly (June 18, 2008) (on file with author) (contending that the legislature "should not enact such a troubling statute without serious debate and consideration by all affected").

[390] This view of celebrity as a valuable tool for personal expression and identity formation only came to be appreciated in recent years. Before the 1980s, celebrity discourse was believed to be a one-way street as audiences accepted the messages encoded in celebrity texts. Intellectuals of the time, like the theorists of the Frankfurt School, viewed celebrity as a part of a larger mechanism for oppression. Horkheimer & Adorno, *supra* note 176, at 100–01; *see also* STURKEN & CARTWRIGHT, *supra* note 175, at 164–68 (describing influence of Frankfurt School theorists' critique of mass media). Herbert Marcuse expanded on this line of thought, contending that the celebrities promoted by the entertainment industry were agents of manipulation and indoctrination that lull individuals into acceptance of an iniquitous social system. MARSHALL, *supra* note 155, at 10 (discussing HERBERT MARCUSE, ONE-DIMENSIONAL MAN (1964)). Meanwhile, celebrity publicity in this period tried to evoke authenticity, i.e., a view of the real person behind the actor on screen. Fan magazines offered glimpses into the stars' private lives, supposedly getting behind the public façade to the real person.

In the 1980s and 1990s, postmodern sensibilities reshaped academic understandings of the semiotics of celebrity. Prior scholars of celebrity were criticized for portraying audiences as unrealistically passive.[391] New academic disciplines emerged to emphasize the unexpected ways in which audiences interacted with celebrity symbols. Media scholar John Fiske argued that consumers appropriated celebrities for their own ends.[392] Audiences developed their own texts by borrowing from and reworking the proffered meanings in celebrity products.[393] According to Fiske, "[p]opular culture is made by the people, not imposed on them; it stems from within, from below, not from above. Popular culture is the art of making do with what the system provides."[394] Others followed suit, maintaining that power was really located not with the producers of culture, but in the consumptive practices of those receiving cultural material.[395] Meanwhile, artists like Andy Warhol revealed that new technologies had usurped some of the cultural authority of celebrities and their handlers as the capacity to reproduce celebrity images also allowed for their meaning to be re-inscribed by different owners.[396] Furthermore, celebrity publicity itself changed, openly acknowledging that its images were inauthentic and inviting audiences to participate in the construction of celebrity narratives.[397]

This new vision of dynamic exchange between celebrities and their audiences could be seen as providing a compelling rationale *against* the expansion of celebrity rights. Laws that prevented derivative use of celebrity messages threatened to take away valuable raw material for the construction of social identity. Some legal scholars have seized on the

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GAMSON, *supra* note 75, at 16. Whether one listened to the academic critics or the stars' publicists, the missives coming from celebrities were not subject to reinterpretation by others. Audiences in this period were viewed as inert receptors of celebrity messages.

[391] Stevenson, *supra* note 173, at 135, 137; *see also* Madow, *supra* note 2, at 192 ("[T]he image-formation process resists centralized capture or control more than celebrities would like.").

[392] JOHN FISKE, UNDERSTANDING POPULAR CULTURE (1989).

[393] Stevenson, *supra* note 173, at 135, 155.

[394] FISKE, *supra* note 392, at 25.

[395] *E.g.*, RICHARD DYER, HEAVENLY BODIES: FILM STARS AND SOCIETY 14 (2d ed. 2004) (noting the role the public plays in cultivating celebrity image); Stuart Hall, *Encoding/decoding*, *in* CULTURE, MEDIA, LANGUAGE 128, 128–38 (Stuart Hall et al. eds., 1980).

[396] STURKEN & CARTWRIGHT, *supra* note 175, at 39. Many cultural studies scholars continue to adopt the same view of the ability of citizens to rework media messages when discussing online entertainment. *See* TURNER, *supra* note 311, at 4 (discussing the increasing influence of audiences as they participate more in the media through formats such as reality television and Web 2.0).

[397] *See* GAMSON, *supra* note 75, at 17 ("Armed with knowledge about the process, the audience doesn't need to believe or disbelieve the hype, just enjoy it."); *see also* TURNER, *supra* note 112, at 55 (theorizing that Madonna's fans are aware of the "cynicism" behind the production of her celebrity image); GARY WHANNEL, MEDIA SPORT STARS: MASCULINITIES AND MORALITIES 201 (2002) ("[F]ootball fans, music lovers and other enthusiasts live out an intense and pleasurable relation to the object of their passion, and also, at the same time, recognize it as commodified, transformed and out of their reach.").

work of academics like Fiske to argue for fewer restrictions on secondary use of celebrity images.[398] Appealing to the need for "semiotic democracy," a term coined by Fiske to describe viewers' ability to attach different meanings to televised images other than those assigned by broadcasters,[399] these scholars argue for reduced publicity rights to allow the dynamic between celebrity and audience to continue.[400]

Despite the appeals of these scholars, "semiotic democracy" has had a narrow effect on the right of publicity. The voices of individual consumers of celebrity are unlikely to be heard when it comes to crafting legislation. It is difficult for citizens concerned about personal expression to coalesce in a way that would make their presence felt in Sacramento, Indianapolis, Nashville, or Albany. "Collective action problems are especially intense in the context of IP policymaking, and they distort policy in favor of producer interests."[401] Instead, other interest groups need to represent these individual citizens if the advocacy of celebrities, licensing firms, and the motion picture industry is to be counteracted. Some groups do attempt to represent individuals that want to use celebrities as a means of personal expression. The American Civil Liberties Union opposed California's initial decision to grant postmortem rights.[402] In general, however, the lobbying efforts of those favoring expanding publicity rights have triumphed.

Moreover, "semiotic democracy" has had little effect on judicial construction of the right of publicity. Some judges attempting to resolve publicity claims do mention the use of celebrities as symbols reflecting individual and group values.[403] One decision even references media

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[398] *See* Niva Elkin-Koren, *Making Room for Consumers Under the DMCA*, 22 BERKELEY TECH. L.J. 1119, 1142 (2007) ("The meaning of a cultural artifact is not inherent in the work itself, but arises from the way it is represented through our language and practices."); Laura A. Heymann, *The Public's Domain in Trademark Law: A First Amendment Theory of the Consumer*, 43 GA. L. REV. 651, 698 (2009) (discussing the "denotation" and "connotation" system of signification, which emphasizes the receiver's role in establishing significance of a particular message); Madow, *supra* note 2, at 143–44 (discussing Fiske's belief that an individual's consumption of celebrity merchandise is a choice that furthers a specific cultural message about the celebrity).

[399] Jedediah Purdy, *A Freedom-Promoting Approach to Property: A Renewed Tradition for New Debates*, 72 U. CHI. L. REV. 1237, 1279 n.129 (2005); Mary S.W. Wong, *Transformative User-Generated Content in Copyright Law: Infringing Derivative Works or Fair Use?*, 11 VAND. J. ENT. & TECH. L. 1075, 1077 n.2 (2009).

[400] *E.g.*, Madow, *supra* note 2, at 134; David Tan, *Beyond Trademark Law: What the Right of Publicity Can Learn from Cultural Studies*, 25 CARDOZO ARTS & ENT. L.J. 913, 988 (2008).

[401] Kal Raustiala & Christopher Sprigman, *The Piracy Paradox Revisited*, 61 STAN. L. REV. 1201, 1222 (2009).

[402] Heller, *supra* note 354, at 550.

[403] *See, e.g.*, ETW Corp. v. Jireh Publ'g, Inc., 332 F.3d 915, 937–38 (6th Cir. 2003); Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 972 (10th Cir. 1996); Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 803 (Cal. 2001).

studies texts.[404] Perhaps relatedly, some recent opinions of the California Supreme Court set forth robust visions of how the right of free expression should be balanced against the right of publicity.[405] According to that court, celebrity images that are so "transformed" by the defendant that they become "primarily the defendant's own expression rather than the celebrity's likeness" are immune to right of publicity infringement claims.[406] Hence, when the defendant adds its own "significant expressive content," the First Amendment trumps the right of publicity.[407] Such a balancing test is appropriate, the court explained, because "celebrities take on personal meanings to many individuals in the society [and] the creative appropriation of celebrity images can be an important avenue of individual expression."[408]

Yet considerations of semiotic democracy have had a relatively small impact on the contours of the right. In general, the cases involving the right that typically made their way through the courts and impressed themselves on the minds of judges and legislators did not appear to involve subcultures appropriating famous personas to make a political statement. Rather they appeared to be blatant attempts to use celebrities on mugs or t-shirts.[409] To lawmakers, those types of activities needed to be shut down so that nascent celebrities would have the incentive to create. Moreover, as Mark McKenna has pointed out, and judges likely believe as well, individual responses to celebrity images typically do not involve merchandising and, therefore, do not fall within the right's ambit.[410] Citizens are free to do whatever they want with a celebrity's persona within the privacy of their own home. As a result, it was improbable that the right of publicity could do anything to affect these private attempts to make meaning from celebrity messages.[411] Other courts have rejected California's "transformation" test, maintaining that it goes too far in allowing others to free ride on someone else's celebrity and paying less attention to the need for individuals to obtain products that rework

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[404] *See Cardtoons*, 95 F.3d at 972 (citing JOHN B. THOMPSON, IDEOLOGY AND MODERN CULTURE: CRITICAL SOCIAL THEORY IN THE ERA OF MASS COMMUNICATION 163 (1990)).

[405] For a discussion of how the jurisprudential balance between property rights and free expression differs in the separate regimes of right of publicity, copyright, and trademarks, see Mark Bartholomew & John Tehranian, *An Intersystemic View of Intellectual Property and Free Speech* (forthcoming 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1943210.

[406] *Comedy III Prods.*, 21 P.3d at 809.

[407] Winter v. DC Comics, 69 P.3d 473, 479 (Cal. 2003).

[408] *Comedy III Prods.*, 21 P.3d at 803.

[409] *See, e.g.*, Audio tape: Texas House of Representatives, Floor Debate (Apr. 9, 1987) (on file with author) (recording the sponsor of Texas's postmortem rights bill providing examples of "crass commercialism," such as pictures on t-shirts and coffee mugs).

[410] McKenna, *supra* note 301, at 293.

[411] *Id.* at 231 n.23.

celebrity messages.[412]

In addition, to the extent judges have recognized the importance of celebrity to individual expression, their responses have been compartmentalized within analysis of First Amendment defenses to right of publicity claims. In other words, whatever contribution the concept of semiotic democracy has made to the scope of the right of publicity, it has not altered the elements of the right of publicity cause of action. As two early critics of right of publicity doctrine stated, "the First Amendment must be brought in by the court as an external limitation on rights that have been defined in isolation from it . . . produc[ing] uncertainties and distortions in what should be a logical coherent structure."[413] Reliance on an uncertain First Amendment defense to safeguard celebrity's role as a tool for individual development likely produces a chilling effect.[414] Celebrities with superior legal resources can sue start-up businesses that may not want to proceed to a trial if they are forced to rely on a hazy defense based on free expression.[415] In sum, although individual consumers have reasons not to support expansive publicity rights, their voices did not register with the legislators and judges weighing the costs and benefits of celebrity protection.

VI. CONCLUSION

It took decades for the right of publicity to become the valuable economic property interest that it is today. The right first appeared in 1953, but it only became descendible, broad enough in scope to cover all aspects of persona, and free from its privacy right limitations at the end of the twentieth century. Although the commercial importance of celebrity increased during this period, that is not the whole story. For most of the century, judges and lawmakers expressed reservations over the psychological effects of fame on the famous and their audiences. They also worried over the democratic implications of celebrity. It was only when their perceptions of celebrity became rationalized and democratized in the 1980s and 1990s that they permitted doctrinal innovations greatly

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[412] Doe v. TCI Cablevision, 110 S.W.3d 363, 373–74 (Mo. 2003).

[413] Felcher & Rubin, *supra* note 331, at 1579.

[414] *See* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 580–81 (1977) (Powell, J., dissenting) (maintaining that the ambiguous nature of the majority's articulation of a First Amendment defense for news reporting would lead to "media self-censorship").

[415] *Cf.* William McGeveran, *Rethinking Trademark Fair Use*, 94 IOWA L. REV. 49, 52 (2008) (contending that the uncertainty surrounding doctrinal safeguards for free expression in trademark law "creates a classic chilling effect upon the unlicensed use of trademarks to facilitate speech, even when such uses are perfectly lawful"); Lisa P. Ramsey, *Increasing First Amendment Scrutiny of Trademark Law*, 61 S.M.U. L. REV. 381, 453 (2008) (maintaining that explicit First Amendment analysis in trademark cases can potentially be counterproductive if such analysis cannot be performed at the motion to dismiss stage and litigation costs force defendants to settle rather than litigate).

strengthening the rights of celebrities.

Although this Article investigates the social history surrounding a single property right, it may offer a potential description of the conditions needed for new property rights to flourish. If the same cultural and political forces that propelled the right's expansion manifested during the emergence of other property rights, this experience offers persuasive evidence of the environmental conditions needed for such rights to develop. One should be cautious in reading too much into the history of a particular property right. The development of the right of publicity may be unique. But maybe not. Research in a different aspect of intellectual property—trademarks—reveals that courts only agreed to abandon strict doctrinal limitations on the rights of mark holders after concerns over the cultural effects of advertising were assuaged.[416] As with the right of publicity, judges investigated the psychological and democratic impact of robust trademark rights before deciding to change the legal terrain. Comparisons of the cultural circumstances surrounding the genesis of other property rights would be helpful. Future research could track the discourse surrounding other new subjects for "propertization" to determine if the same social understandings were present when courts and legislatures decided to provide legal recognition. The history of the right of publicity suggests that when judges and legislators elect to grant property rights, they have more in mind than "if value, then right."[417]

[416] *See* Mark Bartholomew, *Advertising and the Transformation of Trademark Law*, 38 N.M. L. REV. 1, 12 (2008) ("Advertising's importance to the national economy, its embrace by a critical mass of cultural observers, and the professionalization of the advertising field all led to greater judicial safeguards against brand-name 'free-riding.'").

[417] Dogan & Lemley, *supra* note 2, at 1172–73.